

University of Windsor

Scholarship at UWindor

Law Publications

Faculty of Law

5-2011

The Regulation of In-House Counsel: Opening the Pandora's Box of Professional Independence

Pascale Chapdelaine
University of Windsor

Follow this and additional works at: <https://scholar.uwindsor.ca/lawpub>



Part of the [Law Commons](#)

Recommended Citation

Chapdelaine, Pascale. (2011). The Regulation of In-House Counsel: Opening the Pandora's Box of Professional Independence.
<https://scholar.uwindsor.ca/lawpub/55>

This Unpublished Paper is brought to you for free and open access by the Faculty of Law at Scholarship at UWindor. It has been accepted for inclusion in Law Publications by an authorized administrator of Scholarship at UWindor. For more information, please contact scholarship@uwindsor.ca.

THE REGULATION OF IN-HOUSE COUNSEL: OPENING THE PANDORA'S BOX OF PROFESSIONAL INDEPENDENCE

By Pascale Chapdelaine*

Abstract

The number of lawyers who practice law in-house has significantly increased over the last thirty years in North America. While in this part of the world, in-house counsel are regulated in the same manner as outside counsel by their professional bars, the recent decision by the European Court of Justice (Grand Chamber) *Akzo Nobel Chemicals Ltd et al. v. European Communities*, reminds us that other parts of the world treat in-house counsel very differently. This paper analyses the justifications for a similar treatment of in-house counsel and outside counsel by the legal profession. While a detailed contextual analysis of in-house counsel's functions reveals a likelihood of greater vulnerability in their ability to balance them with various ethical and professional duties, it also shows that outside counsel face similar ethical dilemmas that may vary in degree or in nature.

The similar regulation of in-house and outside counsel is consistent with a poor articulation by the legal profession of the scope of the duty of professional independence *from* the client. And yet such duty exists. As it can conflict with paramount professional obligations, including the duty of loyalty to the client, its scope is controversial. Leaving the duty of professional independence *from* the client largely undefined is harmful to in-house and also outside counsel, their clients, the legal profession and the public interest. In-house counsel are in a privileged position to provide legal services in accordance with fundamental values of the legal profession. As such, their contribution needs to be better recognized and promoted. Generally, regulatory reform is necessary to nurture in-house counsel's ability to provide legal services as integral members of the bar, while minimizing the risks that the privileged proximity to their clients present. Such reform will inevitably benefit outside counsel who face comparable issues. A clearer articulation of the meaning and scope of the duty of professional independence *from* the client, together with tangible mechanisms to actualize it, will provide greater support to in-house and outside counsel to better understand and integrate their various ethical and professional duties within their role. It will also benefit all interested parties.

* B.C.L., L.L.B. (Mc Gill) LL.M. (K.U.Leuven) Ph.D. (Candidate) Osgoode Hall Law School, York University, Adjunct Professor, Faculty of Law, University of Toronto; formerly Vice-President and Executive Director, Intellectual Property BCE Inc. and Bell Canada and previously, Associate at the Montreal based law firm Lavery De Billy LLP. I thank Harry Arthurs, Raymond Favreau and Trudo Lemmens for insightful discussions or comments on earlier drafts of this paper. All errors are mine.

- I. Introduction
- II. In-house counsel within the legal profession: distinct or familiar?
 - A. The in-house counsel as salaried employee of a single corporate client
 - B. Cumulating business, quasi-legal and legal roles
 - C. “Organic proximity”
 - (i) In-house counsel representing one person and one side all the time
 - (ii) In-house counsel as an “integral part of the business team”
 - (iii) The “ideal” in-house counsel
 - (iv) The substitution phenomenon
 - D. Remuneration for legal services rendered
 - E. In-house counsel’s legal and departmental environment
- III. The Pivotal Significance of the Duty of Professional Independence
- IV. Alleviating ethical dilemmas of (in-house) counsel
- V. Conclusion

I. Introduction

The practice of law in-house is by now well established and is increasingly shaping the present and future of the legal profession in Canada and in the U.S.¹ The percentage of lawyers practicing law in Canada within a corporation (“in house”) or the Government is significant.² Commentators and practitioners predict that it is likely to grow.³ Statistics in

¹ In-house counsel have their own professional associations: The Canadian Corporate Counsel Association (CCCA): <http://www.cancorpccounsel.org/>; an illustration of the well established presence of in-house counsel in Canada is the recent launch of the Magazine Canadian lawyer In House in December 2007. In the U.S., The Corporate Counsel Magazine and the online magazine Corporate counsel.com : <http://www.law.com/jsp/cc/index.jsp> are addressing issues that are specific to in-house counsel. G. C. Hazard, Jr., Ethical Dilemmas of Corporate Counsel (1997) 46 Emory L.J. 1011, at 1012. Professor Hazard outlines the forces at play that explain the phenomenon of the in-house counsel to include: (i) the increased need of corporations for continuous legal assistance (ii) the specialization trend in the legal profession (iii) the work environment of the large law firm comparing equally or less favorably to the environment of in-house legal departments (iv) the strategic position of in-house counsel and power in selecting when and which outside counsel to be retained and (v) the “affirmative self-assurance of corporate counsel”.

² In Ontario, as of December 31, 2009, the percentage of registered lawyers employed as “Corporate Counsel” was 5%, “other” i.e. including the “corporate and non-profit sector” was 13 % and 15 % in “Government” for a total of 33 % of registered lawyers: “Law Society of Upper Canada 2009 Annual Report Performance Highlights”, at 6; available online at the Law Society of Upper Canada website at <http://www.lsuc.on.ca/with.aspx?id=1132> (last visited on February 6, 2011). Those statistics do not give a further break down of how many of those registered lawyers actually perform the function of counsel. In Québec, as of March 31 2010, 54 % of registered lawyers were in private practice and 46% were in the category “other”: Rapport Annuel 2009-2010, Barreau du Québec, at 23, available online at the

the U.S. show similar trends.⁴ Historical accounts of the legal profession point to ups and downs in the importance, power and prestige of in-house counsel since the late nineteenth century, with a “renaissance” of in-house counsel since the mid-seventies onwards.⁵ Among others, the influence of the growth in number and power of in-house counsel, manifests itself by how it shapes the practice of law of outside counsel representing corporations.⁶

website of Le Barreau du Québec www.barreau.qc.ca/pdf/publications/rapports-annuels/2009-2010.pdf. The 2008-2009 Annual Report provides more detailed information. As of March 31, 2009, 16% of registered lawyers were employed in a legal department (9 % in the private sector and 7 % in the public or semi-public sector) 5% were employed as managers or executives, 19 % were employed by the Government or a municipality (5 % at the federal level, 11% at the provincial level and 3% at the municipal level; these numbers do not include other public or semi-public functions such as being member of a board or commission, legal aid, attorney general office or municipal courts) for a total of up to 35% to 40% of registered lawyers potentially performing the functions of in-house counsel: Rapport Annuel 2008-2009, Barreau du Québec, at 19 and 38, available online at the website of Le Barreau du Québec: <http://www.barreau.qc.ca/pdf/publications/rapports-annuels/2008-2009.pdf> (last visited February 6, 2011).

³On earlier statistics on in house counsel and a discussion on the trend towards a growing number of in house counsel, see: B. G. Smith, *Professional Conduct For Lawyers and Judges*, (Fredericton: Maritime Law Book, 1998) Chapter 10, pp 2 and fol.; see the comments by several in-house counsel on the calculations made by their corporations that favor hiring more in-house counsel rather than outsourcing legal services to law firms on a cost-benefit analysis : J. Landry, “Table Ronde, Faire carrière au contentieux”, *Le Journal, Barreau du Québec* 40:3 (March 2008) 21 at 40.

⁴ For a U.S. perspective on the growing importance of “in-house” or “corporate counsel” in the legal profession, see R. E. Rosen, “The Inside Counsel Movement, Professional Judgment and Organizational Representation”, (1989) 64 Ind. L.J. 479 ; M. C. Daly, “The Role of General Counsel Perspective, The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization” (1997) 46 Emory L.J. 1057; for statistics on in-house counsel in the U.S. see: S.L. Schwarcz, “To Make or to Buy: In-House Lawyering and Value Creation” (2008) 33 J. Corp. L. 497, in particular at footnote 2; as of April 2011, the Association of Corporate Counsel (formerly the American Corporate Counsel Association) had over 26,000 members in 75 countries worldwide (including a Canadian Chapter): <http://www.acc.com/> (last visited in April 2011).

⁵ C. D. Liggio, “The Changing Role of Corporate Counsel” (1997) 46 Emory L.J. 1201, at 1201-1207, refers to three distinct periods of the in-house counsel status and role within the American legal profession since the twenties. The 1920s and 1930s were a period of “glory” for in-house counsel: their advice was highly sought by management and their position in their corporation ranked comparably to the most senior ranks in their client corporation. The forties until the mid seventies saw a decline in the role and prestige of the corporate counsel. Liggio attributes it to the emergence of business school training and to the fact that their graduates were the newly highly sought after senior executives. Finally, he characterizes the mid-seventies onwards as the “renaissance” of the corporate counsel. Liggio attributes it to four factors: (i) an increasingly litigious society (ii) the greater legal complexity of doing business (iii) the exponential growth of outside counsel fees and (iv) the application of business principles and techniques to legal services, as well as being more critical of and outspoken about the legal profession. See also Daly, *supra* note 4, at 1059 and fol.; S. M. Kim “Dual identities and dueling obligations: preserving independence in corporate representation”(2001) 68 tenn. l. rev. 179, at 199 and fol.; D. A. DeMott, “The discrete roles of general counsel”(2005) 74 Fordham L. Rev. 955, at 957 & fol. ; S. H. Duggin, “The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility” (2007) 51 St. Louis U. L.J. 989, at 995-1001.

⁶ The correlation between the increased influence and prestige of the in-house counsel and the nature of the legal practice of outside counsel was already noted more than twenty years ago by A. Chayes & A. H. Chayes, “Corporate Counsel and the Elite Law Firm” (1985) 37 Stan. L. Rev. 277, at 293-299; see also R.L. Nelson and L.B. Nielson, “Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations” (2000) 34 Law & Soc’y Rev., 457, at 457-458.

In-house counsel in Canada and in the U.S., are regulated in the same manner as outside counsel by the Codes of professional conduct of provincial (or state) bars and law societies.⁷ At least two professional bars address the practice of law in-house more specifically.⁸ Le Barreau du Québec, for example, issued a report in 2008 on in-house counsel, in which it discusses in detail their unique position and its implications for the rules of professional conduct.⁹

There is a growing body of academic literature on the ethical issues of in-house counsel in the U.S.¹⁰ This trend has been amplified in recent years in the aftermath of corporate scandals that involved in-house counsel: WorldCom, Tyco, Rite Aid, Hewlett Packard and Enron.¹¹ The adoption by U.S. Congress of the *Sarbanes-Oxley Act of 2002*¹² in an

⁷ Hereafter referred to generally as “Codes of Professional Conduct”. See: The Canadian Bar Association *Code of Professional Conduct 2009* (hereafter the “CBA Code”), Canadian Bar Association, available online at <http://www.cba.org/CBA/activities/code/>, xiv: specifies that the CBA Code applies to lawyers indiscriminately of the nature of their practice (i.e. whether private practice, employee of a corporation or the Government); the Law Society of Upper Canada, *Rules of Professional Conduct*, Adopted by Convocation June 2000, as amended), (hereafter the “L.S.U.C. Rules”), available online at Law Society of Upper Canada website at <http://www.lsuc.on.ca/regulation/a/profconduct/>; Rule 1, 1.02 “Definitions”, “lawyer”; *Code of ethics of advocates*, c. B-1, r.1, (hereafter the “Québec Code of Ethics”) available online at the website of Barreau du Québec http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB_1%2FB1R1_A.htm, 1.00.01; the Law Society of Alberta *Code of Professional Conduct*, February 2007, (hereafter the “L.S.A. Code”), online: Law Society of Alberta http://www.lawsocietyalberta.com/resources/rulesOfTheLawSociety_Y2RgvP.cfm, section “Interpretation”, 4. “Definitions in this Code”, (n) “lawyer”.

⁸ Barreau du Québec, *Guide 2008 de déontologie appliquée aux avocats en entreprise*, available online on the website of Le Barreau du Québec <http://www.barreau.qc.ca/publications/avocats/index.html>; the L.S.A. Code, supra note 8, Chapter 12, The Lawyer in Corporate and in Government Service; other codes include occasional references to in-house counsel for illustrative purposes or to emphasize the application of a rule of conduct to the in-house counsel: the CBA Code, supra note 7, Chapter V Impartiality and Conflict of interest between clients, commentary 32 B: the L.S.U.C. Rules, supra note 7, 2.02(1.1), 2.02 (5.1) and (5.2), commentary to 2.03(3) and 2.05 (3).

⁹ Barreau du Québec, *Guide 2008 de déontologie appliquée aux avocats en entreprise*, supra note 8: the Guide frames the unique position of the in house counsel as follows: (i) the in-house has one single client, which is his employer, (ii) the in-house counsel must ensure compliance with his duty of confidentiality towards his client and (iii) the in-house counsel must maintain his loyalty towards his client-employer while preserving his independence and avoid conflict of interests.

¹⁰ For instance, one symposium was entirely devoted to in-house counsel in 1997: “The Randolph W. Thrower Symposium, The Role of General Counsel Perspective” (reported in (1997) 46 Emory L.J.); another symposium focused on ethics in corporate representation: “Colloquium Ethics in Corporate Representation” (reported in (2005)74 Fordham L. Rev.).

¹¹ For a review of the ethical issues of lawyers involved in these corporate scandals, see S. H. Kim, “The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper” (2005)74 Fordham L. Rev. 983; Regarding the Hewlett Packard spying scandal, see S. Reisinger, “Saw No Evil” (2007) Corporate Counsel, January at 68.

attempt to address securities fraud, as well as the counsel-corporate client relationship, is also worth mentioning to explain this trend. For its part, the Canadian academic literature on the ethical issues in-house counsel is scarce.¹³

While the regulatory regimes of Canadian provinces and American states all embrace an “egalitarian” approach towards in-house and outside counsel, the European scene is much more diverse. The regulation of in-house counsel varies significantly from one country to the other. At one end of the spectrum, there are jurisdictions where in-house counsel are not allowed to be members of the bar while being employees of their client-corporation. At the other end of the spectrum, in-house counsel are regulated by their bar in the same manner as outside counsel. In between, in-house counsel are allowed to be members of the bar, subject to entering into a special agreement that imposes specific requirements regarding their employment to safeguard their independence.¹⁴ The highest court in Europe recently reinforced the trend towards a different treatment of in-house counsel in the legal profession. In *Akzo Nobel Chemicals Ltd et al. v. European Communities*,¹⁵ the

¹² Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7245 (Supp. II 2002)) hereafter the “Sarbanes-Oxley Act” or “SOX”; SEC Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205.4 (2003) (Responsibilities of supervisory attorneys); 17 C.F.R. § 205.5 (2003) (Responsibilities of a subordinate attorney).

¹³ The recent Canadian academic works dealing specifically with ethical issues of in-house counsel include: Paul D. Paton, “Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era” (2006) 84 Can. Bar Rev. 533; Smith, *supra* note 3, devotes Chapter 10 of her book to “The Lawyer as in-house counsel”; for an empirical study of the ethical decision making of in-house counsel, based on a survey conducted with the Canadian Association of Corporate Counsel, see: H. P. Gunz and S. P. Gunz, “The Lawyer’s Response to Organizational Professional Conflict: an Empirical Study of the Ethical Decision Making of In-House Counsel” (2002) 39 ABLJ 241; for an analysis of ethical issues of Government counsel, see: D. MacNair, “In the Service of the Crown: are Ethical Obligations Different for Government Counsel?” (2006) 84 CBR 501; A.C. Hutchison, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46 Osgoode Hall L.J. 105; for an account on the paucity of Canadian academic work on legal ethics generally, see: A. M. Dodek, “Canadian Legal Ethics, a Subject in Search of Scholarship”, (2000) 50 University of Toronto Law Journal 115; see also A.M. Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 Osgoode Hall L.J. 1 in particular at 44, where the author points to important gaps in Canadian legal ethics literature, including the particular case of in-house counsel.

¹⁴ For a discussion on the various regulations of in-house counsel in European countries see Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd et al. v. Commission of the European Communities*, 2007, paragraphs 149 to 171, Court of First Instance European Communities (hereafter the “Akzo Nobel case, first instance”). See also the Opinion of Advocate General Kokott, delivered on 29 April 2010, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, at paragraphs 89 and 101.

¹⁵ *Akzo Nobel Chemicals Ltd et al. v. Commission of the European Communities*, 2010, C-550/07 P, The Grand Chamber of the European Communities, available online at <http://curia.europa.eu/jurisp/cgi-bin>.

Court, Grand Chamber confirmed the judgment by the Court of First Instance,¹⁶ to the effect that in-house counsel lacked the necessary professional independence from their client by virtue of their employment link to their employer corporation.¹⁷ Hence it was held that the ‘legal professional privilege’ (or ‘LPP’)¹⁸ did not apply to the communications between an in-house counsel and the other members of his employer corporation. The case involved the judicial review of various decisions by the European Commission based on the Commission’s powers of investigation on competition matters, and in particular, on the Commission’s refusal to apply the LPP to certain documents that were seized in the course of its investigation.

The differential treatment of in-house counsel in Europe may come as a surprise to many North-American lawyers. This begs the question whether the legal profession in Canada and also in the U.S., has overlooked the different status and position of in-house counsel by assimilating them to outside counsel for regulatory purposes.¹⁹ Why has the well established presence of in-house counsel, in number and power, been receiving so little attention in the Canadian academic literature? Are in-house counsel more likely than outside counsel to encounter ethical dilemmas that deserve greater attention and support from the legal profession?²⁰ What does this uncontroversial equal treatment between in-house and outside counsel reveal about the legal profession?

¹⁶ Supra note 14.

¹⁷ Akzo Nobel case first instance, supra note 14, par. 166 to 174.

¹⁸ The “Legal professional privilege” or ‘LPP’ refers to the protection of confidentiality of communications between lawyers and their clients for which the following conditions must be present: (i) such communications are made for the purposes of the exercise of the client’s rights of defense and (ii) they emanate from independent lawyers: the Akzo Nobel case, supra note 14, at par. 117.

¹⁹ One possible explanation advanced is the desire and persuasiveness of in-house counsel not to be treated differently than their outside counsel colleagues, for fear to be relinquished to a “second-class status” with the loss of prestige and recognition from the profession that would ensue: S.R. Weaver, “Ethical Dilemmas of Corporate Counsel: a Structural and Contextual Analysis” (1997) 46 Emory L.J. 1023, at 1031.

²⁰ For a recent Canadian empirical study on ethical dilemmas encountered by in house counsels, see Gunz and Gunz, supra note 13 at 252- 263 and at 279. The authors performed an empirical study that comprised the analysis of 484 questionnaires filled out by in-house counsel throughout Canada. The participants displayed low levels of “Organizational Professional Conflict”. The authors explain these results by categorizing the respondents into three distinct categories: “Lawyer”, “Technician” and “Observer”, and that not perceiving an existing organizational professional conflict may be attributable to how in-house counsel views her role. On whether in-house counsel are more likely than outside counsel to disciplinary actions, see Paton, supra note 13, at 544: the research performed by the

The main purpose of this article is to question the premises underlying the similar treatment approach of the legal profession between in-house counsel and outside counsel. In Part II, I discuss important characteristics of in-house counsel's practice of law and how they may raise ethical issues. I compare their situation with the reality of outside counsel to assess the legal profession's approach to treat inside and outside counsel alike. While I point to some differences between in-house and outside counsel that may place in-house counsel in a more vulnerable position, they are more likely to be variations in degree rather than substantial differences. The privileged position of in-house counsel places them at an advantage to provide legal services in accordance with the core values of the legal profession. This contribution needs to be better recognized and the proper support needs to be in place to promote it even further. In Part III, I look at the current regulation of the legal profession and whether sufficient support is provided to in-house counsel and outside counsel. I take a closer look at the duty of professional independence as the pivotal point to understand the uniform approach taken by the legal profession to regulate in-house counsel and outside counsel. The duty of professional independence *from* the client is poorly articulated in our Codes of Professional Conduct. It is overshadowed by other duties that are all geared towards ensuring an undivided and devout service toward the client. The uniform regulation of in-house and outside counsel is consistent with a timid articulation of the duty of professional independence *from* the client as well as of the ideal counsel. Yet the duty of professional independence *from* the client exists and for that reason, it needs to be articulated better, for the benefit of counsel, their clients, the legal profession and the public. I also seek to explain the lack of consensus and representation by the legal profession of the "ideal counsel". In Part IV, I look at ways by which the legal profession can provide better support to in-house and outside counsel through regulation. In addition to articulating more clearly the duty of professional independence *from* the client and of the ideal counsel, I explore how Codes of Professional Conduct, as binding instruments for members of the legal profession, can

author in the reported professional conduct cases of the Law Society of Upper Canada did not indicate a larger number of disciplinary actions involving in house counsel than outside counsel.

be used effectively to ensure that important structural aspects of the practice of law are aligned to counsel professional duties.

The analysis presented in this article is based on a review of Codes of Professional Conduct,²¹ recent Canadian and U.S. academic literature on in-house counsel, including accounts of empirical research on in-house counsel, Canadian lawyer magazines,²² as well as similar U.S. magazines. It is also based on my personal experience as outside counsel and in-house counsel for over fourteen years. The greater emphasis of this paper is on corporate, commercial in-house counsel in the private sector, but some of the remarks may apply to counsel in the public sector (especially counsel working for public corporations), as salaried employee to a single client, recognizing that Government functions within the public sector bring another set of distinct issues that call for different considerations.²³ The main reason for the focus on corporate, commercial in-house counsel is that transactional counsel are by essence not confronted with the institutional scrutiny that results from the involvement of the judiciary and the more immediate and visible need to balance between the client interests and duties towards the courts, opposing parties and their counsel.²⁴ The transactional practice of law may therefore expose counsel to greater ethical dilemmas and require more ethical vigilance and awareness.

²¹ Reference to the “Codes of Professional Conduct” in this paper refer generally to the body of legal profession codes of ethics and conduct in Canada. References are made to The CBA Code, supra note 7. While Canadian lawyers are regulated by independent Provincial Bars or Law Societies, the CBA Code has been adopted by some Provincial Bars and Law Societies, with modifications. It is used as a point of reference to define Canadian standards of conduct in the legal profession: see “About the CBA Code of Professional Conduct”, available online at the Canadian Bar Association website at <http://www.cba.org/CBA/activities/code/> (last visited, February 6, 2011). References are also made to specific Provincial Rules of Professional Conduct, in particular to the L.S.U.C. Rules, supra note 7, the Québec Code of Ethics, supra note 7, the L.S.A. Code, supra note 7, and The Law Society of British Columbia *Professional Conduct Handbook*, last revised in November 2010, (hereafter the “LSBC Rules”), available online at the Law Society of British Columbia website at: http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html.

²² “Canadian Lawyer In-House” available online at the Canadian Lawyer website at: <http://www.canadianlawyermag.com/INHOUSE-Digital-Edition.html>, (December 2007-December 2008) ; “Le Journal, Barreau du Québec”, available at Le Barreau du Québec website at : www.barreau.qc.ca/journal (2003-2008), “Ontario Lawyers Gazette” available online at the Law Society of Upper Canada website at [http://www.lsuc.on.ca/news/b/olg/\(2005-2008\)](http://www.lsuc.on.ca/news/b/olg/(2005-2008)), “National Magazine”, available at the Canadian Bar Association website at: <http://www.cba.org/CBA/National/Main/> (2003-2008).

²³ For a discussion on the ethical issues of Government counsel see MacNair, supra note 13.

²⁴ C. Parker & A. Evans, *Inside Lawyers’ Ethics* (Cambridge: Cambridge University Press, 2007) at 214, argue that corporate lawyers ethics (including outside counsel) may be more important than any other sector of the profession, given that corporate lawyers are involved in almost every economic activity of our society.

II. In-house counsel within the legal profession: distinct or familiar?

What is specific to in-house counsel's practice of law²⁵ and how does it contrast with or corroborate our ideals of the legal profession, as expressed in the Codes of Professional Conduct? Geoffrey C. Hazard, Jr. has characterized the role of the in-house counsel as one of the most complex in the legal profession.²⁶ In his work on the in-house counsel movement in the U.S., Robert Eli Rosen discerned for his part three common characteristics to describe the work and functions of the in-house counsel at the largest corporations: (1) in-house counsel perform the same work as outside counsel in all areas of practice; (2) in house counsel have a management function vis-à-vis the outside counsel, acting as "corporate agents" for legal services on behalf of their corporation; and (3) legal prevention functions.²⁷ An empirical study by Robert L. Nelson and Laura Beth Nielson on how corporate counsel approach their work suggests that they navigate between three distinct roles: "cops" i.e. "limiting their advice to legal mandates", "counsel", i.e. "combining legal and business advice", or "entrepreneurs", i.e. "giving priority to business objectives rather than legal analysis."²⁸ Another empirical study based on interviews with Ontario lawyers, that was conducted by Margaret Ann Wilkinson, Christa Walker and Peter Mercer, revealed that in-house counsel were significantly more concerned about issues of role than outside counsel.²⁹ In-house counsel also exhibited higher on-going stress levels after a conflict with their client

²⁵ For a description of the functions performed by in-house counsel in the U.S. see, Daly, *supra* note, 5 at 1068-189; Kim, *supra* note 5, at 201-202; Kim, *supra* note 11, at 1001-1033.

²⁶ Hazard, *supra* note 1, at 1011.

²⁷ Rosen, *supra* note 4, at 504.

²⁸ R.L. Nelson and L.B. Nielson, *supra* note 6 at 457, 460-461 & 468: the authors focused their research on interviews with 54 individuals, 42 of whom are corporate counsel and 12 of whom are non-lawyer managers in a large financial corporation, from three large U.S. urban areas. Their analysis revealed that about 17% were associated with the role of the "cop", 33% met the definition of the "entrepreneur" and 50% fell into the category of "counsel".

²⁹ M.A. Wilkinson, C. Walker and P. Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views on the Practice of Law" (2005) 18 Can. J.L. & Juris. 165, at 183: the study involved the analysis of interviews conducted with 154 lawyers in large, medium-sized and smaller firms at four different –sized centers in Ontario.

representative had occurred, than their outside counsel colleagues.³⁰ The authors concluded from their study that in-house counsel constitute a distinct group within the legal profession.³¹

I present here in-house counsel's functions through five distinctive aspects: (i) in-house counsel as salaried employees of a single corporate client (ii) the combination of legal, quasi legal and non legal roles (iii) the "organic proximity" of in-house counsel (iv) the impact of the remuneration method for rendering legal services from the perspective of recipients of such services and (v) the legal department environment of in-house counsel.

A. In-house counsel as salaried employees of a single corporate client

In *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excises (No.2)*, Lord Denning characterized the position of the in-house counsel as being no different from the one of the outside counsel: "Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. ...In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. ... They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honor and of etiquette. They are subject to the same duties to their client and to the court."³² Yet, the employment situation of in-house counsel to a single corporate client is the most frequently invoked factor to

³⁰ *Ibid*, at 183.

³¹ *Ibid*, at 186.

³² [1972] 2 All.E.R. 373 (C.A.), at 376. In that case, one of the issues was to determine whether the legal professional privilege applied to communications between legal advisers and their employer (who is also their client). The Court of Appeal found that it did apply.

distinguish in-house counsel from outside counsel.³³ The concern is that this total financial dependence of in-house counsel to their single client-corporation may compromise their professional independence³⁴ and place them in a situation of personal conflict of interest.³⁵ In order to properly assess the validity of this concern, one first needs to clarify the meaning of “professional independence.”³⁶ When analyzing the potential impact of in-house counsel’s reliance on a single source of revenue on their ability to retain their independent professional judgment, we generally refer to the type of professional independence that a lawyer needs to maintain from external influences (to the client) to unequivocally and loyally serve their clients’ interests. Such external influences are addressed among others by the various conflicts of interest rules in the Codes of Professional Conduct.³⁷ The in-house counsel client is the corporation, not its representatives.³⁸ A situation of personal conflict of interest can thus arise when the corporation representatives, on which in-house counsel’s performance evaluation and remuneration depend, have expectations and exert pressures on in-house counsel’s role that conflict with their duty to serve the best interests of the corporation.³⁹ Performance

³³ S.R. Weaver, *supra* note 19, at 1027; Hazard, *supra* note 1, at 1015-1016; DeMott, *supra* note 5, at 967-968; Kim, *supra* note 5, at 257; Paton *supra* note 13 at 538; Duggin *supra* note 7, at 1035; E. Norman Veasey, Christine T. Di Guglielmo, “The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation” (2006) 62 *Bus. Law. 1*, at 11-12.

³⁴ DeMott, *supra* note 5, at 967-968, Paton *supra* note 13, at 538; Veasy and Di Guglielmo, *supra* note 33, at 11-12: although Veasy and Di Guglielmo acknowledge the risk that the independent professional judgment of the employed in-house counsel may be at risk, they also note that: “...the employment relationship may also enhance an in-house lawyer's job security as compared with that of outside counsel, giving the in-house lawyer a greater opportunity to influence positively the company's legal policies.”

³⁵ Kim, *supra* note 5, at 207-208. One way to approach this potential personal conflict of interest arising from the fact that the in-house counsel is the employee of his client-corporation is the fact that this conflict is fully disclosed to the client-employer and that by the employment of the in-house counsel the client has waived his rights under the conflict of interest rules either explicitly or implicitly. However, if we take a broader view of professional independence *from* the client as an obligation that is owed to the state and the public, and not the client, then it could not be the subject of a waiver: see Kim, *supra* note 5, at 250.

³⁶ The various meanings of professional independence are discussed in Part III of this paper “The Pivotal Significance of the Duty of Professional Independence”.

³⁷ This type of professional independence is referred to as “Three-Party independence”: see discussion below in Part III of this paper.

³⁸ L.S.U.C. Rules, *supra* note 7, 2.02 (1.1); for a discussion on the conceptual and practical difficulties posed by this principle, see, A. C. Hutchison, “Who’s the Client and Why it Matters?” (2006) 84 *CBR* 411, at 425.

³⁹ Kim, *supra* note 11, at 1053 and fol.: the author proposes structural solutions to address this misalignment. On the function that a gatekeeping approach to the practice law of in-house can have on reinforcing the alignment of in-house counsel’s duty to represent the corporation (and not its representatives) see: S.H. Kim, “Lawyer Exceptionalism in The Gatekeeping Wars” (2010) 63 *SMU L. Rev.* 73.

objectives and remuneration incentives that are pre-defined by the client-employer-corporation can also have important effects on the ethical behavior of in-house counsel. It is a common practice for in-house legal department performance objectives to be aligned with the ones of the corporation.⁴⁰ Ethical issues may arise when those performance incentives and objectives are misaligned with in-house counsel's ethical duties to retain independent professional judgment and to preserve the client corporation's best legal interests.⁴¹

Similar misalignments between the best interests of the client-corporation and financial pressures of counsel also exist in an outside counsel environment.⁴² From that perspective alone, in-house counsel may be in an even better position than outside counsel to provide legal advice that is unencumbered by financial considerations of billable hours, status and prestige of retaining a client in the firm.⁴³ Many commentators suggest that in today's highly competitive environment for legal services, the financial pressures experienced by outside counsel may be different than the ones of in-house counsel, but they are no less significant.⁴⁴ Yet, the "all or nothing" position that in-house counsel are facing should not be underestimated.⁴⁵ Outside counsel may rightly fear that their position could be seriously weakened if they lose a major client, but they can still act for others. In-house

⁴⁰ See the comments by Monique Mercier, Vice-President of legal affairs at Emergis, stating that it is essential for the objectives of the law department to be aligned with the ones of the corporation and of the CEO: L. Vadnais, "Maximiser le rôle de l'avocat en entreprise, passer avantageusement de conseiller juridique à conseiller stratégique" *Le Journal, Barreau du Québec* 38:6 (June 2006) at 20.

⁴¹ See the discussion in Part IV of this paper.

⁴² R. W. Gordon, "The independence of lawyers" (1988) 68 B.U. L. Rev. 1, at 34; Duggin, *supra* note 5, at 1035; Kim, *supra* note 5, at 204: the author notes similarities with the law firm environment and high competition around legal services; J. Landry, "Les avocats en entreprise Un Code d'éthique efficace s'inscrit dans la culture d'entreprise" *Le Journal, Barreau du Québec* 40:2 (February 2008), 8: where some of the in-house counsel interviewed on ethical issues of in-house counsel, point out that the greatest pressures they felt about compromising their professional judgment to deliver a legal opinion that would please the client were in private practice, because the economic stakes (i.e. potentially losing a big client) were so high, and that in comparison, they never experienced such pressure as in-house counsel.

⁴³ See the discussion in this Part II, D below "Remuneration for legal services rendered".

⁴⁴ *Supra* note 40.

⁴⁵ Kim, *supra* note 5, at 204.

counsel have no other clients to fall back on. At the same time, some in-house counsel argue that they are better protected than outside counsel are on the possible retaliatory measures of their client, given that the dismissal of an employee counsel is a more drastic step than quietly selecting a new outside counsel.⁴⁶ Ultimately, the impact of the single source of revenue ties of in-house counsel to their client corporation may not so much be how likely it is that the corporation's representatives will actually dismiss or otherwise "punish"⁴⁷ in-house counsel for not taking an agreeable position to their own interests. Rather, the proper question is: how likely is it that in-house counsel will be more influenced in their professional judgment by the perceived threat of such retaliation (whether real or not) than outside counsel? While the "single source of revenue" factor is a critical issue to consider when looking at the likely behavior of in-house counsel, outside counsel are not immune from similar considerations. Also, the potential effects of "single source of revenue" need to be assessed in combination with other aspects of in-house counsel's environment: some factors may add to the pressures and create personal conflicts of interests, while some others may place in-house counsel in a more enviable position to serve the interests of both their client and the legal profession.

B. Cumulating business, quasi-legal and legal roles

In-house counsel often cumulate roles and responsibilities that entail distinct business and legal functions.⁴⁸ Commentators have pointed to increased ethical dilemmas created by a

⁴⁶ See J. Landry, *supra* note 42, in which one of the interviewed in-house counsel points out that a client can more easily change law firms than fire a lawyer who gives a legal opinion that the client is discontent with. He adds that refusing to give an opinion that will please the client is no just cause of termination and that the in-house counsel is better protected in that regard; See J. Landry, "Table ronde, Les avocats en entreprise, porte-étendard de la rectitude" *Le Journal, Barreau du Québec* 40:1 (Janvier 2008) 11, at 12; the comments of Me Depelteau on the fact that there is support and even respect in a corporate environment when an in-house counsel says that he wants to withdraw from a case.

⁴⁷ See Hazard, *supra* note 1, at 1015-1016, where the author adds the risk of being "professionally blacklisted".

⁴⁸ It is not uncommon to see in-house counsel cumulating human resource, ethics or privacy compliance management functions with legal roles. See L. Vadnais, *supra* note 40, at 20. For a discussion on the determinant motivator of cumulating various functions, attracting lawyers towards in-house counsel positions, see Daly, *supra* note 4, at 1072. DeMott, *supra*, note 5, at 965 and fol. describes four roles generally cumulated by general counsel: (1) legal adviser to the corporation and its constituents (2) corporate officer and member of senior management team (3) administrator of the internal legal department and (4) agent of the corporation in dealings with third parties; see Veasey and Di Guglielmo, *supra* note 33, at 25.

juxtaposition of these roles by in-house counsel.⁴⁹ A typical example of a corporate practice that may raise ethical issues is having the corporation's legal counsel (whether in-house or outside counsel) sit on its board of directors, therefore cumulating potentially conflicting roles.⁵⁰ Another example, at a more day-to-day level, could involve an in-house counsel who is also fulfilling a management role in another department, such as the human resources department. Hypothetically, she could be asked to implement a company policy that is to grant less than the legal requirements for severance pay upon the termination of employment of its employees, as a calculated effort to reduce the company's costs in this area. As a human resources manager, she is rewarded and evaluated on the number of employee terminations that she handles per year at the lowest cost. As a lawyer, she knows that the severance offers are below the minimum legal requirements. In such instances, the in-house counsel /human resources manager may be in conflict with her ethical obligations, depending on how we define the proper role of counsel.⁵¹ If in-house counsel are asked to simultaneously perform business activities as well as legal services and are incented and rewarded on both (for example, with business performance targets), then the lawyer-client relationship becomes at best blurry.⁵² Although there can be a great synergy by this knowledge and expertise being combined, one can think of many instances where the competent legal advice that ought to be given in the best interest of the client-employer and the business objectives may diverge. This places counsel in an ambivalent position that is less than desirable from an ethical perspective.⁵³ This has lead some commentators to take the position that in-house counsel should refrain altogether from cumulating formal roles other than the one of legal advisor to the Corporation and be very cautious in taking on any non-legal functions.⁵⁴ Although

⁴⁹ DeMott, *supra* note 5, at 965 and fol.; Guglielmo, *supra* note 33, at 25.

⁵⁰ Kim, *supra* note 5, at 247 & fol.; see also Veasey and Di Guglielmo, *supra* note 33, at 15 & fol.; Duggin, *supra* note 5, at 1016 & fol.; C. C. Albert, "The Lawyer-Director: An Oxymoron?" (1996) 9 *Geo. J of Legal Ethics* 413.

⁵¹ I.e. whether she is a hired gun serving the immediate identified need of the client or a legal adviser with the duty to uphold and promote the application of the law. The various conceptions of the proper roles of counsel vary significantly depending on whether we see this role as based on the liberal advocacy ideal or the ideal of law as a public profession: see Gordon, *supra* note 42, at 10-11.

⁵² See the discussion in this Part II, C (iv) below: "The substitution phenomenon".

⁵³ Weaver, *supra* note 19, at 1039 argues the more role counsel will cumulate, the more he is at risk to be in situations of conflict of interest.

⁵⁴ *Ibid*, at 1039-1040.

this may appear as the sounder and safer approach to take, the pressure that in-house counsel may feel from the corporate culture to take on additional roles should not be underestimated. Refusing such advancement opportunities may be negatively perceived by senior management as a lack of flexibility to respond to the demands of the organization or a risk adverse mentality that runs counter to corporations' expectations with respect to their employees.

One could argue that the combination of roles by in-house counsel and the potential conflict of interests that can arise from it can be resolved by way of an implicit or explicit waiver or similar mechanisms by the employer-client. This would constitute the recognition of ongoing potential conflicts and would be similar to the specific waivers that clients sign when counsel disclose a situation of conflict of interest that may impair their ability to serve the interests of the client without any obstruction. Although it may work conceptually in some cases, in others, the conflict is irreconcilable. Take for example the in-house counsel /human resources representative. What is there to be waived? How is counsel to know which course of action to take to fulfill her management role while respecting her duties to her client-employer and to the legal profession? How could the corporation-client agree in advance to a blanket waiver in a truly informed manner, without being able to fully understand all potential detrimental effects to the client-employer of such waiver? Also, putting into the client-employer's hands the ability to waive potential conflicts of interest of counsel, that may be detrimental to the client-employer and other affected parties, is only acceptable legally and ethically, if counsel does not owe a greater overarching duty to the legal profession and to the public to maintain a greater distance *from* the client, which on that basis could not be waived.⁵⁵

From a professional conduct perspective, lawyers have a duty to advise their client of any portion of their advice that is not legal advice.⁵⁶ This rule flows from the general duty

⁵⁵ See E. W. Myers, "Examining Independence and Loyalty" (1999) 72 Temp. L. Rev. 857, at 863, where the author refers to professional independence from the client as being absolute: "It inheres in the structure of the American legal profession. This obligation is non-waivable by the client and non-negotiable. Indeed, two-party independence is not a duty to the client at all--it is a responsibility of lawyers to the legal profession."

⁵⁶ CBA Code, *supra* note 7, at Chapter III, "Advising Client", Commentary 10: reminds the duty of lawyers to clearly advise client of any portion of their advice that is not legal advice; LSUC Rules, *supra* note 7, at 2.01(1) Commentary.

of care and the duty to provide competent legal advice. In theory, when the duty to advise the client on non legal advice is complied with, it can also mitigate any misunderstanding on the scope to which the solicitor-client privilege may apply.⁵⁷ More generally, counsel may be subject to the same standard of care for business advice as the one applicable to legal advice.⁵⁸ While it may seem possible in theory to apply the rules of professional conduct that require that the client be notified of the non legal portion of advice that is provided, this is difficult to apply in practice. Except for the formal written legal opinion that is usually accompanied by an extensive list of caveats and disclaimers, most transactional work will involve a large amount of verbal opinions, contract negotiations and drafts which inevitably and invariably contain a blend of legal and business considerations and advice and for which no formal notice is ever given. The combination of legal and business advice is also encouraged by a prevailing business and corporate culture that affects in-house counsel and outside counsel. The fact that in-house counsel are contextually more likely to be solicited to provide non legal advice than their outside counsel colleagues does not exclude that this is a reality for outside counsel as well.⁵⁹ The business acumen of in-house counsel (and also outside counsel) is strongly valued and nurtured and is often a prerequisite to survive and gain respect from the client-employer representatives.⁶⁰ Codes of Professional Conduct that require that counsel put the client on notice on any advice that is non legal, seem to run counter to ongoing widespread practices on how legal services are performed, both for in-house and outside counsel. In that context, the foundations and application of such rules merit reconsideration to protect

⁵⁷ *Guide 2008 de déontologie appliquée aux avocats en entreprise*, supra note 8, at 13 and fol.; S.R. Weaver, supra note 19, at 1037 and fol.; Veasey and Di Guglielmo, supra note 33, at 26.

⁵⁸ Duggin, supra note 5, at 1015. Lawyers, by their professional affiliation and duties, are in some respects expected to conduct themselves in a manner that is above the one of the ordinary citizen: see the L.S.A. Code, supra note 7, at Chapter 8, Statement of Principle, which refers to applying the “highest business standards in the community” when a lawyer is involved in the business aspects of the practice of law. Clients, in their dealings with lawyers, expect that certain standards will be respected in the quality of their service: see for example the L.S.A. Code, supra note 7, at Chapter 1, Commentary G.1, which states that lawyers are in a “quasi-official position in society by virtue of privileges conferred on them by the state”.

⁵⁹ Veasey and Di Guglielmo, supra note 33, at 27: the authors raise doubt on the extent to which outside counsel may provide less business advice than in-house counsel.

⁶⁰ See the discussion in Part II C. of this paper.

in-house counsel, but also outside counsel, while ensuring that matters such as the solicitor-client privilege are properly addressed.

The combination of business and legal advice or functions raises a more fundamental question of the ideal model of lawyering that should be encouraged by the legal profession: technician of the law, hired gun, gatekeeper or influential advisor?⁶¹ In light of the recent securities fraud scandals and the involvement of in-house and outside counsel in them, this question is triggering a revived interest⁶² that resonates beyond the existence and role of in-house counsel.⁶³ Describing the combination of various roles and types of advice as a common denominator of the typical in-house counsel, Rosen noted more than 20 years ago that the “Inside Counsel Movement” challenged the profession on the degree of influence that ought to be exercised by lawyers.⁶⁴ He gave the example of preventive law programs that may “extend too far the profession’s jurisdictional claims, because they may require lawyers being complicit in too much non-compliance”.⁶⁵ He also suggested that the legal profession’s endorsement of a more independent and influential counselor role could entail the recognition that “professional judgment involves not only expertise but also political judgment about how to exercise corporate leadership.”⁶⁶ Codes of Professional Conduct currently allow significant flexibility in the

⁶¹ See Rosen, *supra* note 4, at 520, on the role of “ally to run the corporation profitably and legally”, as opposed to the one of a policeman that in-house counsel plays in counseling corporate client on compliance matters; M. A. Wilkinson, P. Mercer & T. Strong, “Mentor, Mercenary or Melding: An Empirical Inquiry Into the Role of the Lawyer” (1996) 28 Loy. U. Chicago L.J. 373; B. A. Green, “Thoughts about Corporate Lawyers after Reading the Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?” 51 De Paul L. Rev. 407 (2001); Veasey and Di Guglielmo, *supra* note 33, at 28 and *fol.*, discuss three distinct roles for corporate counsel : advocates, gatekeepers, or persuasive counselors, (opting for the latter role); for an analysis of the ability of counsel to play the role of gatekeepers, see: S. H. Kim, “Gatekeepers Inside Out” (2008) 21 Geo. J. Legal Ethics 411.

⁶² Kim, *supra* note 11; Duggin, *supra* note 5, at 1020 states that “many lawyers lost their way because of a “dual failure of vision.” They lost sight of the corporation itself as their true client and they saw “their role in unacceptably narrow terms—as mere implementers or transaction engineers, rather than as broadly-gauged corporate counselors or advisers.” (citing T. G. Bost, “Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality” (2006) 19 Geo. J. Legal Ethics 1089, at 1118).

⁶³ Rosen, *supra* note 4, at 530.

⁶⁴ Rosen, *supra* note 4, at 530.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

style of lawyering that can be adopted by counsel in providing legal services.⁶⁷ It is also clear that by their position, in-house counsel are more likely to be solicited to provide non legal services, whether in an official capacity or not.⁶⁸ The fluidity that the Codes of Professional Conduct exhibit on how counsel may provide legal advice to their client is also reflected by the ambiguity around the meaning of “professional independence.”⁶⁹ Raising these issues more formally to remind counsel of their professional duties may prove to be of great support and help clarify the ethical dilemmas that counsel, in particular in-house, may face in similar situations.⁷⁰ More fundamentally though, the combination of various defined and less defined roles for in-house counsel and the ethical issues that this interlinking with the client itself pose, raise fundamental issues about the identity of lawyers in the legal profession. It raises questions on the balancing act and tensions that subsist between the pillar duty of loyalty to the client and the duty of professional independence *from* the client.⁷¹ At this point in time, it seems that the latter is overshadowed by the former.⁷² This partly explains the difficulty to clearly identify the better ethical conduct to adopt when legal and non legal functions are cumulated.

C. “Organic proximity”

⁶⁷ For example The LSUC Rules, supra note 7, commentary to rule 2.02 (5.2), last paragraph, on the “up the ladder” reporting duties of lawyers, including in-house counsel, present various models of lawyering through the use of broad language: “These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.”

⁶⁸ Veasey and Di Guglielmo, supra note 33, at 25.

⁶⁹ See discussion about the different meanings of professional independence in Part III below; M. Beaudoin, “Déontologie : marcher sur un fil de fer” *Le Journal, Barreau du Québec* 39:7 (July 2007) 9.

⁷⁰ Paton, supra note 13, at 561 points out: “The ability for a lawyer in an in-house position to have a broader and more complex influence on corporate decision-making is both enticing and dangerous: where does the line get drawn between legal advice and business advice in such a context? Where should it be? How might the personal be detached from the professional? The goal of regulators and the profession should be to assist corporate counsel in negotiating their way through these issues. This is where reviewing the Rules of Professional Conduct and their application to the unique challenges corporate counsel confront should be a first order priority.”

⁷¹ Myers, supra note 52, at 858.

⁷² *Ibid.*

Developing legal expertise and business knowledge of one single corporate client on a full time basis, becoming an “integral part of the business team” often enhances the quality of the relationship between in-house counsel and the corporation representatives, up to the most senior ranks of the organization. It can also lead to a non trivial phenomenon down the road: the in-house counsel identifies with the client⁷³ and gradually becomes the client, as a result of the “organic proximity” because of its progressive, unwarranted, “natural” fusion. What are the perceptions and expectations of the role of in-house counsel and how may in-house counsel interpret and interiorize their role?⁷⁴

(i) In-house counsel representing one person and one side all the time

In-house counsel’s representation of one organization at all times may expose them to specific ethical issues. Some in-house counsel invoke the desire to be directly connected to one product and to espouse the mission of their employer as a great motivator to practice law in-house, as well as an important differentiator from working at a law firm.⁷⁵ This particularity of in-house counsel’s entire devotion to one client begs the question of the ideal model of lawyering that the profession should encourage and promote.⁷⁶ The single-client, total devotion situation of in-house counsel has been characterized as a variant or another manifestation of the specialization of the practice of law.⁷⁷ Elite law firms often represent exclusively corporations and not employees (except for senior

⁷³ See Kim, *supra* note 5, at 184: the author comments on the dual service of providing legal advice and acting as director on the board of the same corporation: “As attorneys identify increasingly more with their clients’ interests, there is a concern over whether that type of identification results in a corresponding erosion of the ideal of the lawyer as an independent steward of the legal system.”

⁷⁴ As Duggin points out: “Given the multifaceted roles contemporary general counsel play and the influence they exert, how these lawyers approach their responsibilities is at least as important as what they do”: Duggin, *supra* note 5, at 1019.

⁷⁵ See the comments by Me Gagnon in J. Landry, *supra* note 3, at 21.

⁷⁶ Gordon, *supra* note 42, at 2 discusses the overspecialization of lawyers having taken precedence over a more general counseling function, in the broader context of his discussion on the loss of the ideal of Law as a public profession and the ideal of independence from clientele.

⁷⁷ Hazard, *supra* note 1, at 1012.

management) in labor dispute cases, or pharmaceutical companies and not class actions on behalf of consumers in product liability cases and so forth. The main reasons invoked are conflicts of interest. The result is that elite law firms may also end-up representing a particular segment of clients, and with that, a similar context and perspective to legal issues most of the time. From that view, the position of in-house counsel may not be all that different from the one of outside counsel practicing at larger law firms.⁷⁸ However, outside counsel get exposed to various organizations in different industries with different practices and philosophies which give them points of comparison amongst their clients.⁷⁹ They may more easily become aware, for example, that certain corporate strategies are marginal and do not represent standard corporate practice. When warning their client about a doubtful corporate practice, their exposure to other organizations may give them more credibility to the corporation-client representative. From that perspective, the position of outside counsel can nurture a certain distance and the ability to exercise critical judgment. In contrast, by being exposed to one way of thinking and doing, all the time, in a sense, to a single normative reference, in-house counsel may be more at risk as a result of gradually losing their independent professional judgment. The inherent paradox of in-house counsel is that their gain in knowledge, expertise, efficiency and competence to better serve their single-client corporation comes with the loss of the benefits that derive from exposure to a broader range of perspectives. For the legal profession, the trade-off of constant proximity to the client means less encouragement to look at broader interests that go beyond the immediate demands of the client. The question of the suitability of representing one side and one client all the time magnifies the tension in the legal profession between the two ideals of loyalty to the client and professional independence.⁸⁰ What is the optimal degree of proximity, confidence and candor required between counsel and client to deliver the best legal advice? What is the breaking point where that same proximity may compromise the manner by which the

⁷⁸ D. Markovitz, *A Modern Legal Ethics, Adversary Advocacy in a Democratic Age* (Princeton: Princeton University Press, 2008) at 219, explains how in addition to over specialization, the American bar is split between two hemispheres: i.e. the lawyers representing large corporations and organizations and the ones representing individuals with a very small percentage of the profession ever crossing the equator (citing an empirical study by J.P. Heinz & E.O. Laumann, "Chicago Lawyers: The Social Structure of the Bar", in *Lawyers: a Critical Reader* (Richard L. Abel ed., 1997) 27, at 31).

⁷⁹ Unless they work for one single client on a full time basis, which is not the norm.

⁸⁰ Myers, *supra* note 52, at 860.

services are rendered? Acknowledging the presence of a balancing act between gaining relevant expertise and knowledge about the client-corporation's business while at the same time keeping enough distance to remain critical in order to deliver competent legal advice is one way to expose the tremendous strength and power and also significant vulnerability that can result from the single client-corporation environment in which they evolve.

(ii) In-house counsel as an “integral part of the business team”

One of the success factors of in-house counsel is often their ability to “become an integral part of the business team.”⁸¹ This is in fact one of the most frequently invoked reason by lawyers who make the shift in their career from private practice to a corporate in-house environment.⁸² They find it more rewarding and stimulating to be involved in the business decisions and to be involved as early as possible in the business deal. As Nelson and Nielson point out, when counsel practice in-house “part of their professionalism lies in the practiced art of embracing their new clients' objectives as their own.”⁸³ By gaining an intimate knowledge of their client corporation's business, not only is it encouraged that in-house counsel provide input on the business aspects of a commercial agreement or litigation matter, but it is expected.⁸⁴ Also, as an “integral part of the business team,” counsel may be inclined to adopt negotiation tactics that may be acceptable from a

⁸¹ Kim, *supra* note 5, at 206 writes: “The differences between the internal motivations and attitudes of inside lawyers as opposed to outside lawyers should not be discounted. Inside lawyers tend to feel as though they are integral members of a team, and their goals are centered on furthering the long-term success of the corporate enterprise. These lawyers “view themselves as facilitators and expeditors of their employer's goals to a greater extent than many outside lawyers would.”

⁸² See the comments of the in-house counsel interviewed in J. Landry, *supra* note 3 at 21; Weaver, *supra* note 19 at 1035; more generally on the various motivations that incite a lawyer to practice law in-house, see De Mott, *supra* note 5, at 961 and fol.

⁸³ Nelson and Nielson, *supra* note 6 at 489.

⁸⁴ Veasy and Di Guglielmo, *supra* note 33, at 22: “General counsel's position within the corporation provides added value that is rarely matched by outside counsel. In-house counsel, and the general counsel in particular, usually have a deeper and broader knowledge of the client's business than do outside counsel. In addition, in-house counsel's skills may be specialized to match the corporation's needs.”; see sections below “The in-house counsel as part of the business team” and “The Ideal In-house counsel”.

business perspective but that nevertheless raise professional ethical issues.⁸⁵ To what extent can in-house counsel's allegiance and loyalty to the representatives of the client-corporation unfavorably taint their professional judgment?

The particular challenge for in-house, and also outside counsel, of providing legal services to client-corporations, is that their client is the corporation, not its representatives.⁸⁶ However, corporations speak and act through their authorized representatives. The best interests of the corporation may be hard to discern at times⁸⁷ and counsel's judgment will be inevitably influenced by how their senior representatives present the corporation's interests to them.⁸⁸ The question is whether "being an integral part of the business team" affects in-house counsel's independent professional judgment to a greater extent than it does for outside counsel.⁸⁹ As Deborah A. DeMott observes: "counsel may tend to address legal questions in a manner that pays allegiance to the wisdom of executive-level commitments and perspectives, even in the absence of explicit instructions from other members of the team."⁹⁰ Other commentators point to the "moral interdependence" that develops between in-house counsel and the client-corporation, making the disassociation of the acts of the latter from the ones of the former more difficult.⁹¹ As witnessed by the recent corporate scandals, in extreme cases, this sense of

⁸⁵ The L.S.A. Code, supra note 7, at Chapter 11, "The Lawyer as Negotiator", outlines the expected standards of behavior of a lawyer involved in negotiations.

⁸⁶ L.S.A. Code, supra note 7, at Chapter 12, "The Lawyer in Corporate and Government Service", Rule 1.; Québec Code of Ethics, supra note 7, at 3.06.05.01; *Guide 2008 de déontologie appliquée aux avocats en entreprise*, supra note 8, at 7.

⁸⁷ Kim, supra note 5, at 199; see however the qualifier on the best interests of the corporation in the L.S.A. Code, supra note 7, at Chapter 12, "The Lawyer in Corporate and Government Service", Statement of Principle, being "as they are perceived by the Corporation or Government"(underscored for emphasis), suggesting that the counsel needs to defer to the Corporation's appreciation of what constitute its best interest. These would need to be done in accordance with rules of professional ethics: see Rule 4 of Chapter 12 which states that counsel should never take instructions that would amount to a breach of professional ethics or that would encourage the commission of a crime or fraud.

⁸⁸ Kim, supra note 5, at 257.

⁸⁹ See for example Kim, supra note 5, at 199 & fol., where the author argues that the pressures of the complexity of this lawyer-client relationship in the organizational setting is even greater in the case of the in-house counsel.

⁹⁰ DeMott, supra note 5, at 969; See also Duggin, supra note 5, at 1004 where the author raises the risks that the special relationship developed between in-house counsel and senior managers may compromise general counsel ability to give objective legal advice; see also: Kim, supra note 5, at 207.

⁹¹ Paton supra note 13, at 560 (referring to an article by R.W. Painter and J. E. Duggan, "Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation" (1996) 50 SMU L. Rev. 225).

loyalty can turn into overzealousness and lead to a complete misreading of in-house counsel's role to serve the best interests of the corporation. DeMott describes this phenomenon as "misdirected and excessive loyalty."⁹² This sense of loyalty that develops between in-house counsel⁹³ and representatives of the client-corporation may not necessarily be all that different from the relationship outside counsel develop with their key corporate clients.⁹⁴ However, overtime, it is the devotion to one single client-corporation that is likely to create a greater sense of attachment to the client-corporation's representatives that may distinguish in-house counsel from outside counsel.

The sense of belonging of in-house counsel to the business team and to the business may be particularly appealing, but in-house counsel commentators recognize the tensions that it creates with their professional duties.⁹⁵ However, this factor, i.e. the "close affiliation" to the business team, may be countered by the fact that in-house counsel, with their multi-faceted role⁹⁶ also have to "live with the deal" and the consequences of a chosen course of action.⁹⁷ It gives them the incentive to think about the consequences of their actions more thoroughly.. On the positive side, the proximity of in-house counsel to their sole client-corporation also enables in-house counsel to gain more easily confidence and to

⁹² De Mott, *supra* note 5, at 975. One extreme example of espousing the client's cause and taking the least orthodox courses of action to make issues literally "go away" is illustrated in the estranged in-house counsel character of Karen Crowder incarnated by Tilda Swinton in the movie "Michael Clayton". The in-house counsel of a large chemicals corporation ends up hiring killers to get rid of their external counsel who was about to seriously compromise the chemicals company's interests in the middle of a huge environmental class action suit. It illustrates (*albeit* at an extreme level) how a totally dedicated and devout counsel to her corporation felt pushed to commit a serious crime. The film shows the pressures of the business culture of that fictional corporation as well as the isolation of the in-house counsel as important contributing factors leading her to commit those crimes.

⁹³ And that is required of them.

⁹⁴ Hazard points out: "Lawyers in a corporate law department, as they are often reminded, are part of the "corporate team." This slogan is a claim of primary loyalty by the corporate client. Yet, it is no stronger a claim than clients implicitly make upon lawyers in independent practice. After all, the independent lawyer's client also can say, "What am I paying you for?" Hazard, *supra* note 1, at 1017.

⁹⁵ J. Landry, *supra* note 46, at 12: see the comments of Me Nollet where he notes that while your client employer wants you to be "part of the team", as in-house counsel, you can never entirely "play" with the team and need to keep a certain distance.

⁹⁶ Including the one of enforcement, monitoring, compliance, see Part II B. "Cumulating business, quasi-legal and legal roles".

⁹⁷ A. Macaulay, "In the House", Legal Transitions, National Magazines legal Career supplement, 1:1 (March 2006, see the comments by S. Bodley, Vice-President and Assistant General Counsel Centrica Direct Energy Toronto, whereby the accountability factor, i.e. having to live with the deal was one noted difference with outside counsel and even a motivator to make the move towards in-house practice.

interact with more candor with the representatives of their client-corporation. This allows in-house counsel to provide better legal advice, positively influence the corporate client's conduct towards legal compliance, and even mitigate and reduce the likelihood of illegal actions being committed.⁹⁸ Some in-house counsel, drawing on their personal experience, perceive their ability to influence persons of power to be much greater than if they were practicing law as outside counsel.⁹⁹ This special relationship of confidence and candor between counsel (including outside counsel) and the client (through the corporation's representatives) is also thought to be made possible in great part because of an almost absolute duty of confidentiality of the lawyer to the benefit of her client. In Canada, the exceptions to the duty of confidentiality in favor of the client are indeed very limited.¹⁰⁰ Although outside counsel can also develop relationships of confidence and great quality of communication channels with their corporate client, in-house counsel, by their mere physical presence, sole dedication to one client and network connection to the communication channels of their corporation will inevitably always have access to more information than outside counsel ever will. Hazard describes it as the "water cooler" phenomenon.¹⁰¹

⁹⁸ A. Chayes & A. H. Chayes, *supra* note 6 at 283 describe how the "informal legal contact" may offer even greater opportunity of "anticipatory law" than when inside counsel is involved in the formal strategic process (which the authors also consider an important aspect of in-house counsel role in positively influencing management decision). See J. Landry, *supra* note 42, at 8, for example, the comments of Me Y. Gauthier.

⁹⁹ See J. Landry, *supra* note 42, at 8, comments of Me Y. Gauthier, where he states that when confronted to undesirable directions by the corporation, he would feel at ease to involve several corporation representatives and influence a change in the course of action. His view is that he would not have been able to achieve the same results as outside counsel.

¹⁰⁰ In Canada, there are generally three exceptions to the duty of confidentiality to the client: (i) the public safety exception (to prevent someone about to commit a crime that is likely to cause bodily harm), (ii) when specifically "required by law" or (iii) when counsel needs to make his case against the client for example to defend himself, or in a claim for unpaid fees for services rendered : CBA Code, *supra* note 8, at Chapter IV, Confidentiality; see also L.S.A. Code, *supra* note 7, at Chapter 7 rule 8 (c) has a rule broader than public safety as it allows to lift the confidentiality obligations towards the client to prevent the commission "of any other crime"; LSBC Rules, *supra* note 21, at Chapter V, rule 12; L.S.U.C. Rules, *supra* note 7, at 2.03 (2) to (5); Québec Code of Ethics, *supra* note 7, at 3.06.01.01.

¹⁰¹ Hazard, *supra* note 1 at 1019: "Here lies the most significant difference between corporate counsel and lawyers in independent practice. The difference, simply stated, is in the factual conditions of their day-to-day work. To put the point bluntly, a lawyer in independent practice is sheltered from the informal, back-channel information that flows around the company water cooler. Instead, engagement of an independent law firm is necessarily predicated on a distillation of the facts about the matter in question. This is so even when the outside lawyer is given all of the documents and access to all of the company employees. Back-channel information simply cannot be recreated. And there are times, I have been told, when outside counsel may be retained on the basis of selected facts precisely to accommodate a response that provides a desired outside opinion."

There is a certain appeal for counsel to be involved in every step of the business deal up to its conclusion. The perception is that counsel is then better positioned to influence the business deal favorably from both a business and legal perspective than the lawyer requested to do the paper work in the 11th hour.¹⁰² However, the advantage of in-house counsel over outside counsel in the level of information that is accessible to them¹⁰³ can also become a liability and place in-house counsel in a less enviable position and with greater ethical dilemmas than their outside counsel colleagues.¹⁰⁴ When actions of the client-corporation come under scrutiny, in-house counsel may be in a more difficult position to prove that they were not aware of the actions under attack.¹⁰⁵ As Sarah Helene Duggin writes, after reviewing studies of both inside and outside counsel behavior that suggest that they make decisions based on “what it takes to survive and advance” in their environment: “These studies highlight the importance of aligning the objectives of both business managers and business lawyers with those of society. Shared objectives need to include a strong sense of the importance of complying with the law. In the end, perhaps the most useful aspect of Sarbanes-Oxley and the SEC implementing rules is not the resulting procedural mechanism but the clear message that norms are not fungible and that business managers and corporate attorneys need to work together to ensure corporate integrity.”¹⁰⁶ Ultimately, the proper manner to address the risks posed by this close proximity between in-house and also outside counsel and their client-corporation representatives is tributary of the weight that the legal profession is willing to give to the duty of professional independence *from* the client.¹⁰⁷

¹⁰² See however De Mott, *supra* note 5, at 968 where the author points to the negative aspects of being involved too early: “... to the extent general counsel participates at an early stage in shaping major transactions and corporate policy, counsel’s ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white.”

¹⁰³ Gordon, *supra* note 42 at 53: the author describes the fragmentation of information that outside counsel are left with given the increased power of general counsel through increased internal knowledge and their piece meal outsourcing of legal services.

¹⁰⁴ Hazard, *supra* note 1, at 1017.

¹⁰⁵ See Veasey and Di Guglielmo, *supra* note 33, at 24, who also points out that the expectation and assumption that general counsel ought to know everything may at times be completely unjustified.

¹⁰⁶ Duggin, *supra* note 5, at 1039.

¹⁰⁷ The duty of professional independence *from* the client is discussed in Part III of this paper.

(iii) The “ideal” in-house counsel

In addition to in-house counsel’s unique position encouraging them to “be an integral part of the business team”,¹⁰⁸ one phenomenon specific to in-house counsel is the conceptions and expectations that transpire from their organization’s culture that shape the “ideal” in-house counsel. Even though each organization has its own culture, the literature suggests common traits of the “ideal” in-house counsel. The question is: how do these expectations shape in-house counsel’s practice of the law? How may they influence their ethical behavior? Ideal in-house counsel as viewed by CEOs and CLOs¹⁰⁹ are often described as having great business minds combined with pragmatic legal analysis skills, a great knowledge of the company’s culture and of its operations, markets and challenges.¹¹⁰ They are also very pro-active¹¹¹ and a “take charge” person. Corporation representatives typically loathe the “can’t do” attitude.¹¹² They prefer someone who is creative and solution oriented, and who works with the business representatives to overcome any “legal hurdles” that may come along the way.¹¹³ One President described the role of his in-house counsel as follows: they are “maestro with tainted glasses”: explaining that they need to play more than one instrument and that they cannot easily say no to a request from senior executives.¹¹⁴

¹⁰⁸ See section C (ii) of this Part II above “The in-house counsel as an “integral part of the business team””.

¹⁰⁹ For a review of the attributes valued by corporate clients of their in-house counsel see Daly, *supra* note 4, at 678-679.

¹¹⁰ J. Landry, *supra* note 46, at 12, see the comments of Me Desjardins.

¹¹¹ For a discussion on pro-active lawyering as particularly prevalent in in-house counsel culture, see Veasey and Di Guglielmo, *supra* note 33, at 23.

¹¹² See L. Vадnais, *supra* note 40, at 20, comments made by Jacques Parisien, President of Astral Media Radio.

¹¹³ In Nelson and Nielson *supra* note 6, at 460 and 490, analyzing the results of interviews performed with 54 lawyers, the authors explain how in-house counsel identify with their business and how they constantly adapt their roles to the needs of their business. Lawyers are influenced by the reaction of business people to their legal advice and this influences the way in which they will provide legal advice the next time: “When lawyers are criticized by business people or when businesspeople resist legal advice in various ways (by not going to lawyers at all, or by choosing to go to a different lawyer within the corporation, or by complaining to higher ups that the lawyers are not “team players”) it affects how the lawyer will behave the next time. Although we have emphasized the ways corporate counsel “construct” their roles, it is important to recognize that this is a reciprocal process among the lawyers, their “clients,” and other members of top management.”

¹¹⁴ Comments by Jacques Parisien, CEO of Astral Media Radio reported in L. Vадnais, *supra* note 40, at 20.

The in-house counsel qualities described above contain great ingredients to create the competent, client focused, timely and cost effective lawyering that the legal profession strongly promotes and aspires to. The pro-activeness and mitigation work components of in-house counsel can also promote broader public interests such as encouraging and ensuring a higher level of obedience of the law by corporate actors.¹¹⁵ At the same time, we need to ask whether on the contrary the ideal of the in-house counsel can create immense pressures that may lead in-house counsel to misunderstand their role and depart from their professional duties, making them more vulnerable than outside counsel? Can the great business mind combined with the desire to please (even more so for an in-house counsel with short foresight and lack of experience) lead an individual to take even greater risks than the competent lawyer would do, espousing the very essence of the corporation's "risk taking DNA"?¹¹⁶ Similarly, is the pressure to make the issues go away, as a testimonial of in-house counsel's wit and efficiency, likely to create more professional conduct issues for in-house counsel than for an outside counsel?¹¹⁷ There is some empirical evidence, and my personal experience supports that evidence, that many in-house counsel are anxious not to be perceived as road blocks.¹¹⁸ This state of mind and the pressure felt around not providing any advice that may lead to that perception may explain the (passive) role that some in-house counsel played in recent corporate scandals.¹¹⁹ Thus, the "ideal" in-house counsel, from a legal ethics perspective, may not always corroborate with the "ideal" in-house counsel as viewed from the employer-client

¹¹⁵ Kim, *supra* note 5, at 251: "Corporate lawyers in particular have the unique ability to represent the legal system to the client and thereby fulfill their public-oriented functions. When corporate lawyers perform their duties responsibly, corporations can function more effectively, and given the central role that corporations play in society, the effective performance of the corporation results in a greater public good."

¹¹⁶ J. Landry, *supra* note 3, at 40, see the discussion amongst in-house counsel on the importance of internal support within the legal department, especially with respect to more junior lawyers, who may have more difficulty to push back on the unreasonable demands of a client.

¹¹⁷ Paton, *supra* note 13, at 544: the author's research into the L.S.U.C. cases of professional conduct does not suggest greater disciplinary actions against in-house counsel than for outside counsel.

¹¹⁸ See Duggin *supra* note 7, at 1021-1022, referring to the empirical study by Nelson and Nielson, *supra* note 6.

¹¹⁹ Veasey and Di Guglielmo, *supra* note 33, at 26: "A corporate culture that emphasized getting the deal done quickly with too little regard for getting the deal done in an ethically and legally appropriate manner-and company lawyers' inability or unwillingness to apply the brakes-may have been a factor contributing to the corporate scandals around the turn of the twenty-first century. The pressure on general counsel and other in-house counsel to enable rather than "inhibit" deals may be strong in those companies where managers are particularly skeptical about the value of the legal department."

corporation representatives, or more importantly, as perceived by in-house counsel. As Duggin points out, general counsel often enjoy enviable positions in senior ranks of their client-corporation and consequently, they should use that authority to impose high ethical standards and provide the necessary support to all in-house counsel (under their supervision) in addressing ethical matters.¹²⁰ Concrete means to encourage that behavior and to address structural issues that may have opposite effects need to be considered.¹²¹

(iv) The substitution phenomenon

We already discussed the risk of cumulating business with legal roles in one person and how this could raise conflicts of interest.¹²² The “substitution phenomenon” is one instance of cumulating business and legal functions, where the lawyer takes the business decision in her hands without even consulting another corporation representative. In such cases the in-house counsel acts as agent of the corporation and is no longer in a mere advisory role.¹²³ The substitution phenomenon is more likely to occur in a transaction intimately intertwined with a heavy legal component, where no apparent business unit has accountability. This may lead counsel to perceive (whether rightly so or not) that there is no person in the organization more competent than the in-house counsel to make the decision. Therefore, in-house counsel feel empowered to make the decisions without any other consultation. This can also be fuelled by a desire to show initiative and efficiency, by not encumbering business colleagues with legalese and hence to truly “add value” to the Corporation.¹²⁴ A similar but quite distinct situation occurs when in-house counsel act in a non legal capacity such as when they need to perform purchasing

¹²⁰ Duggin supra note 7, at 1022-1023.

¹²¹ See the discussion in Part IV of this paper.

¹²² Part II, B. “Cumulating business, quasi-legal and legal roles”.

¹²³ This situation is to be distinguished with cases where counsel overrides client instructions and decides to act as she thinks would be the proper handling of the case. This is what authors as Wilkinson, Walker and Mercer describe as acting as surrogate for the client, which, as the authors point out, should raise concern, especially when representing a physical person, as counsel goes beyond representing her client: Wilkinson, Walker and Mercer, supra note 29 at 180 and 190.

¹²⁴ On the ideal behaviors of the in-house counsel, see section C (iii) below: The “ideal” in-house counsel.

functions for the legal department.¹²⁵ In his article on “The Inside Counsel Movement”, Rosen talks about the substitution phenomenon as one that is likely to arise with outside counsel as well. He also suggests that the in-house counsel intrinsic knowledge of the corporation they serve positions them to make better decisions in the name of the client than the outside counsel.¹²⁶ The substitution phenomenon is also manifest in the relationship between inside and outside counsel, the latter often being the sole voice of the “client”.¹²⁷ It is perfectly conceivable that when counsel substitute themselves for the client-corporation, they do so while representing the best interests of the client-corporation, without an organization representative being part of the decision leading to it. This is so provided that in-house counsel act within the constraints of the general agency relationship that is then being created. In a way, the substitution phenomenon may even make it easier for in-house counsel to act adequately in the best interests of the corporation, as in such case, there is no intermediary representative between them and the client organization that could eventually taint their professional judgment unfavorably.

D. Remuneration for legal services rendered

The salaried status of in-house counsel to a single corporation employer and other monetary incentives may increase ethical dilemmas for in-house counsel.¹²⁸ How can this remuneration structure affect the receiver of legal services (i.e. the client-corporation and its business representatives) and the counsel-client relationship? Does it create additional ethical concerns? In-house counsel’s remuneration as salaried employees has at least four consequences on the manner by which the legal services are delivered. First,

¹²⁵ The L.S.A. Code, supra note 7, at Chapter 8, “Lawyer in the business aspects of practice”, provide that when involved in the business aspects of the practice of the law, counsel ought to employ the highest business standards in the community.

¹²⁶ Rosen, supra note 4, at 517: “The frailties of organization, in addition to the uncertainties of translation, help explain why corporations need inside counsel managers. Outside counsel are not as well situated as inside counsel to determine efficiently corporate goals from their client contacts.”

¹²⁷ On the fact that corporation clients value such substitution, Rosen, supra note 4, at 518-519 explains: “Since inside counsel are specialists in the legal needs of their corporation, they can manage outside counsel’s ignorance: They can assume responsibility for organizing, monitoring and auditing outside counsel’s work.”

¹²⁸ See the discussion above in this Part II, A “The in-house counsel as salaried employee of a single corporate client”.

in-house counsel are primarily concerned with managing the work volume and the risk associated to it. They have no parallel pressure to manage the amount of billable hours that they perform in a year.¹²⁹ They are usually incented to and rewarded for providing legal services in a most efficient manner, unencumbered by personal conflict of interest that may arise from revenue targets.¹³⁰ From that perspective, in-house counsel can exercise a strong independent judgment in the breadth of the legal services that are required in the best interests of the client-corporation. Second, by not being billed for legal services, the business representatives of the client corporation may be more inclined to do “counsel shopping” (assuming that there is a medium to large in-house counsel legal department) to get the more favorable legal opinion. Outside counsel are not foreign to the phenomenon of “lawyer shopping” either. The unfavorable ethical behavior that may ensue from such practice will largely depend on the legal environment of in-house counsel. In a centralized legal department where there is consistency and good communication channels between in-house counsel, such situation can be remedied fairly quickly.¹³¹ In an environment where in-house counsel would not feel supported by their fellow in-house counsel in taking difficult stances towards the client-corporation representatives, this may create additional and possibly detrimental pressures on in-house counsel’s independent professional judgment. By taking a position they know will not be supported by their in-house department, they may also fear to undermine the credibility of their department towards management. This last comment points to consistency of service that are common to many organizations and do not only concern in-house counsel in legal departments. Third, client-corporation representatives may create unmanageable work load demands as a result of not having to pay directly for the legal services being offered to them. This may place in-house counsel’s professional duty to deliver

¹²⁹ On a related issue, see : L. J. Fox, “MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud”, (2002) 44 Ariz. L. Rev. 547, at 554 and the author discussion against the instauration of Multi disciplinary practice (MDPs) because of the additional financial pressures it would place on outside counsel independent professional judgment.

¹³⁰ For example a personal conflict of interest could arise for the outside counsel asked to provide an opinion on the likelihood of success of a legal claim. In grey area cases, the prospect of securing a substantive amount of work in the future may be one of the factors influencing outside counsel to recommend litigation.

¹³¹ Formalizing uniform approaches to certain contractual clauses or legal issues that the employer-client often faces is an effective approach to ensure consistency amongst the in-house counsel opinions and diminish the tendency of “counsel shopping”. The impact of the structure of in-house legal departments is discussed below in Part II E. “In-house counsel legal and departmental environment”.

competent legal services in a timely fashion to a strenuous test. Charging business representatives for the legal services delivered through inter corporate transfers is sometimes used to moderate the flow of legal services demands. However, such measures can also discourage the business representatives to seek out legal advice¹³² and lead to a decentralization and loss of control over legal services performed. Work overload in an in-house counsel environment should not be underestimated.¹³³ Factors which may lessen in-house counsel's ability to control volume of work include: their physical proximity to the client representatives, and as stated above, the fact that there is no legal fee for the services rendered. This can, if not managed properly give rise to an overflow of demands from the employer-client organization. A counsel who does not have the time, the expertise or the means to deliver legal services is in potential breach of her professional duties.¹³⁴ The complexity of the multi-faceted practice of in-house counsel requires strong professional judgment. It must also be supported by rigorous mechanisms in place to prioritize the work by degree of importance and minimize low risk, repetitive or trivial requests.¹³⁵ Last but not least, the significant increase in the proportion of in-house counsel in the legal profession is undeniably related to the market realization that in-house counsel can provide legal services of high quality at much lower costs than outside counsel.¹³⁶ This means a broader access to legal services to small and medium sized entities who could otherwise not afford legal services. On that front, in-house counsel serve an important goal of the profession to increase access to legal services, at least to the corporation segment of the constituents they are meant to serve.

¹³² Duggin, *supra* note 5, at 1017 describes how in-house counsel often need to perform the functions of "legal services marketer", i.e. that they need to justify their existence and their value add in a corporate environment.

¹³³ The danger of the lack of resources and support has been raised as a potential risk in the in-house counsel practice environment: see J. Landry, *supra* note 3, at 40, the comments by Me Lebeau.

¹³⁴ The duty of competence and integrity could be compromised: CBA Code, *supra* note 7, at Chapter I and Chapter II; L.S.A. Code, *supra* note 7, at Chapter 2; LSBC Rules, *supra* note 21, at chapter 2 and chapter 3; Québec Code of Ethics, *supra* note 7, rule 3.00.01 and 3.01.01.

¹³⁵ Alleviating ethical issues resulting from an unmanageable volume of work is largely tributary of the support that in-house counsel get from their legal department: see discussion in Part II. E "In-house counsel legal and departmental environment".

¹³⁶ J. Landry, *supra* note 3, at 40: see the comments by several in-house counsel on the calculations made by their corporations favoring hiring more in-house counsel rather than outsourcing legal services to law firms on the basis of a cost-benefit analysis.

E. In-house counsel legal and departmental environment

The structure of in-house counsel's legal department can significantly contribute to alleviating the ethical dilemmas and even to minimizing the risk of professional misconduct by in-house counsel.¹³⁷ Finding the right balance between centralized and decentralized legal services can ensure the proper level of awareness and control of legal and ethical issues as they arise.¹³⁸ It also allows general counsel and in-house counsel to deliver the level of legal services that are required in the best interests of the client-corporation. Centralization also ensures a greater communication between in-house counsel which in turn can provide better support to in-house counsel to navigate through an array of complex co-existing and often conflicting roles. This can help in-house counsel maintain a clearer perspective on their work and duties and hence support greater professional independence.¹³⁹ The extent to which such mechanisms (other than the formal up the ladder reporting obligations for public companies in the U.S.) are common practice is hard to determine. It seems reasonable to presume that in the often high-volume and pressured environment of in-house legal departments, education about and support for discussions on ethical issues may be overlooked.¹⁴⁰ My own experience as in-house counsel is that although such training or discussion of ethical issues was not discouraged *per se*, they were not part of any formal or informal training that was made available to in-house counsel. In contrast, the outside counsel environment is more likely to have mechanisms in place to address at least some of the ethical issues that may arise.¹⁴¹

¹³⁷ Veasey and Di Guglielmo, *supra* note 33, at 31, where the authors discuss the merits (but also the pitfalls) of in-house counsel monitoring their company's use of legal services and how it could indicate trends of compartmentalization of legal services which could raise some red flags.

¹³⁸ For a discussion on legal department structures (i.e. centralized and decentralized) see De Mott, *supra* note 5, at 969; see also Veasey and Di Guglielmo, *supra* note 33, at 35.

¹³⁹ Hazard describes how general counsel should be unequivocal on the steps to follow and on the support their legal team gets when facing potential ethical issues: Hazard, *supra* note 1, at 1021-1022.

¹⁴⁰ Weaver, *supra* note 19, at 1050.

¹⁴¹ This is more likely to be the case in medium to larger size law firms than in smaller ones. One of such widespread system and practice is the verification of any conflicts of interest before accepting a new mandate.

A critical aspect of in-house counsel's abilities to deliver competent legal advice in the best interests of the client-corporation relates to their relationship with and access to outside counsel. Workload issues or lack of expertise in specific areas of the law often requires the assistance of outside counsel. Legal department budget pressures may come in the way of making a decision that is in the best interests of the corporation.¹⁴² Such pressures¹⁴³ may lead misguided counsel to take undue risks and take the matter in their own hands even if they lack the availability or necessary expertise.¹⁴⁴ This can arise when in-house counsel would perceive the immediate budget constraints of their legal department as more important than the interests of the client-corporation to receive competent legal advice in a timely manner. Departmental budget pressures may also lead counsel to select the nature of legal services that they will handle internally as opposed to those they will refer to outside counsel not so much on the basis of required expertise, but on the basis of how the outside counsel expense will be recorded from an accounting perspective.¹⁴⁵ In their relationship with outside counsel, in-house counsel, as agents of the corporation, become the "purchaser" of legal services.¹⁴⁶ The selection process, as in any supply transaction, may raise conflicts of interest issues that in-house counsel should be mindful of.¹⁴⁷

¹⁴² In their empirical study of corporate counsel, Nelson and Nielson report how the three types of ideal counsel studied directly felt the bottom line pressures of their corporation and how they had to meet their business objectives: see Nelson and Nielson, *supra* note 6 at 472. This can translate into feeling the undue pressure of meeting your own legal department budget objectives.

¹⁴³ Coupled with some of the attributes that are expected of the "ideal" in-house counsel, such as resourcefulness, take charge attitudes, effectiveness, see Part II C (iii) "The "ideal" in-house counsel".

¹⁴⁴ For a discussion on the ethical duties of in-house counsel facing budget pressures, see Veasey and Di Guglielmo, *supra* note 33 at 35, where the authors note: "Counsel must resist budget pressures that have the effect of denying needed legal advice to some operations. General counsel may have a duty in certain circumstances to assert persuasive "lobbying" with the CFO and the CEO and, if necessary, take the matter up with the board. It may also be important to inform the board of directors, if necessary, that some needed legal advice has not been provided because of budget constraints."

¹⁴⁵ De Mott also suggests that the justification of the size of their legal department (and maintaining it) may influence General counsel (even unconsciously) decision to retain or not outside counsel, which may not always be in the best interest of the client corporation: De Mott, *supra* note 5, at 972.

¹⁴⁶ See for example Daly, *supra* note 4, at 686 & fol.: the author describes the "purchasing agent" functions of an in-house counsel.

¹⁴⁷ Even though in that case counsel is not performing legal advice per se, he would likely be bound by the conflict of interest rules of professional conduct, either by his supervisory role of delegation for legal services, or by the fact that

The contextual analysis of in-house counsel presented here leads me to conclude on the one hand that the privileged position of in-house counsel in the intimacy, expertise and knowledge with/of the employer client-corporation can also be a burden. The lack of proper breathing distance may weaken their ability to take unpopular stands and to maintain a broader and more detached view and to focus excessively on the immediate needs of the client. The outside counsel can provide legal advice more from a distance and in a more and more specialized fashion, and with an awareness of the landscape and context in which such advice is sought. From that perspective, the in-house counsel may be at a disadvantage. This analysis also reveals that while in-house counsel ethical dilemmas may be higher than the ones of outside counsel, the difference may not be as significant as would appear at first sight. Outside counsel also face ethical dilemmas that can vary in nature or in degree from the ones of in-house counsel.

On the other hand, in-house counsel are well positioned, and in some cases perhaps even better than outside counsel, to incarnate the core ideals of the legal profession and to fulfill their professional duties towards the client. In-house counsel are positioned favorably to fulfill their duty of loyalty to the client and to provide legal services in a competent and diligent manner.¹⁴⁸ Their undivided attention as well as the expertise they develop with respect to the operations of their client can significantly increase the quality and effectiveness of their service. Their position allows them to develop and nurture a relationship of confidence with the representatives of their client-corporation that can give them access to more important and timely information. This in turn can allow them to provide effective legal advice that can have important preventive value and that can better serve their client and even the public. The combination of legal, quasi-legal and business functions often includes responsibilities to ensure legal compliance and monitoring, as well as the timely implementation of new laws as they are adopted. Providing legal services at significantly lower costs than outside counsel, increases access

such ethical conduct is also required in the performance of non legal services: see above discussion in Part II. B. “Cumulating legal, quasi-legal and business roles”.

¹⁴⁸ This is provided that the proper legal department structure and support are in place as discussed in subsection D. and E. of this Part II.

to legal services for corporations who could otherwise not afford to do so. For these reasons, and based on my own personal experience, the practice of law in-house needs to be promoted rather than discouraged. To that end, adequate guidance and support by the self-regulated legal profession is necessary to ensure that the vulnerabilities resulting from in-house counsel's structural environment do not overshadow the advantages that it provides. At the same time, this guidance should also seek to alleviate those vulnerabilities that are common at varying degrees to outside counsel. The next steps require us to look at whether the legal profession currently provides such support and guidance. More particularly, what are the various duties of professional independence, in nature and in scope, how much weight is attributed to those duties, and what impacts does it have on the regulation of in-house and outside counsel?

III. The Pivotal Significance of the Duty of Professional Independence

The adequate regulation of in-house counsel and outside counsel depends in large part on understanding the nature and situating the place of the duty of professional independence *from* the client within the legal profession. Without the existence of such a clear duty, there is *a priori* no reason to regulate in-house counsel differently from outside counsel. If on the other hand, such a duty exists, the contextual approach elaborated in Part II of this paper raises some concerns that are more specific to in-house counsel. It also illustrates areas of concern for outside counsel that vary in nature or in degree.

Professional independence refers to at least three distinct meanings that can create confusion about its exact role in the legal profession. Codes of Professional Conduct, refer predominantly to two meaning of "professional independence" as the independence (i) from the state (both at the level of the profession and at the individual level) and (ii) from any influences external to the client that may impair a lawyer's judgment in providing legal advice. A third meaning of professional independence is professional independence *from* the client. The first meaning of independence, i.e. of the bar and the

legal profession as a whole from any state interference,¹⁴⁹ is the main justification of the self-regulation of the legal profession. For instance, the adoption by U.S. Congress of the Sarbanes-Oxley Act of 2002 and the obligations it imposes directly on in-house and outside counsel has been criticized by many as an encroachment on the independence of the legal profession.¹⁵⁰ In its second meaning, the duty of independence has spurred the development of detailed duties to avoid conflicts of interests (whether they arise from another client or a personal situation, including doing business with the client who is soliciting advice) and of established mechanisms on how to address such conflicts when they arise.¹⁵¹ This second meaning of independence refers to circumstances in which the lawyer may be in breach of her duty of loyalty to the client.¹⁵² Critical to the particular position of in-house counsel vis-à-vis their client-corporation, is the third meaning of professional independence: i.e. the duty to remain at all times independent *from* the client¹⁵³ and from her cause, i.e. “the lawyer standing apart from the client and giving detached, objective advice, fully informed by the law, experience, and the practical ramifications of the client's situation”,¹⁵⁴ balancing the lawyer’s obligations beyond those owed to the client, i.e. to the profession, to the courts and the public interest. The distinction between the second type of professional independence (i.e. more akin to the duty of loyalty owed to the client) and the third type, i.e. independence *from* the client is

¹⁴⁹ See the CBA Code, supra note 7, at Chapter XXII, Independence of the Bar. The Independence of the Bar from any state interference was characterized as one of the “hallmarks of a free society” by the Supreme Court of Canada in *A.G. Can v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at 335; For a recent discussion on the importance of the independence of the Bar, see the Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, “Professional Independence and the Rule of Law” (2007) 23 Windsor Rev. Legal & Soc. Issues, 3;

¹⁵⁰ Paton supra note 13, at 539-540 refers to Canadian law firms opposing to state intervention and regulation encroaching upon profession self regulation.

¹⁵¹ Another duty that flows from the duty of independence of the lawyer is exemplified by the rules dealing with outside interests to the practice of law: the CBA Code, supra note 7, at chapter VII Rule on “Outside interest and the practice of law”; see also Chapter XXII, Independence of the Bar, where it cites the following duties of the lawyer as manifestations of the Independence of the Bar: the duty of integrity, of honesty and candor, the duty of confidentiality and the duty to represent the client resolutely and fearlessly.

¹⁵² Myers, supra note 52 at 861.

¹⁵³ Myers, supra note 52, at 862: the author notes that “In contrast to independence from the state, independence from clients is a much more debated and elusive ideal.”

¹⁵⁴ Myers, supra note 52, at 860.

described by Eleanor W. Myers respectively as the “three-party” v. “two-party” model.¹⁵⁵ The three-party model refers to three involved parties, e.g. counsel, the client and a third party, while the two-party model refers to the relationship between counsel and her client. Myers observes that referring to “independence” for two quite distinct meanings, the first one focusing more on loyalty to the client and the second one referring more to a distance *from* the client: “obscures the differences between them.” She further suggests that “[it] may also lead to a failure to acknowledge the tension between loyalty and independence. Concealing that tension may favor one value over the other. For example, an overly mechanical application of the conflict of interest rules, which are designed, in part, to assure independence from third-party interests to preserve loyalty to clients, has the potential to undermine counsel’s independence *from* the client (the two-party model).”¹⁵⁶

The greater emphasis placed on this duty of independence *from* the client leads certain European bars to view the practice of law and working as employee for a single client, as two incompatible functions. As recently stated by the Court of First Instance of the European Communities in the *Akzo*¹⁵⁷ case: “The requirement as to the position and status as an independent lawyer.....is based on a concept of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs.”¹⁵⁸ The test adopted by the Court to assess whether legal advice was provided in full independence was that the legal advice “was provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.”¹⁵⁹ Bar regulations singling out in-house counsel on that basis illustrate that a greater emphasis is placed, at least in

¹⁵⁵ Myers, *supra* note 52, at 861; as the author also points out at 858: “Independence in the sense that many are using it, meaning independence from third-party interests, both obscures the tension between loyalty and independence and overlooks independence from the client as one of the important aspects of the lawyer’s professional obligations”.

¹⁵⁶ Myers, *supra* note 52, at 861.

¹⁵⁷ *Supra* note 14.

¹⁵⁸ *Ibid*, at par.166, this decision was affirmed by the Grand Chamber in September 2010, *supra* note 15.

¹⁵⁹ *Ibid*, at par.168, similar conclusions were reached by the Grand Chamber, in the *Akzo* case, Grand Chamber, *supra* note 15, paragraphs 45 to 48.

theory, in overriding interests of the administration of justice than it is the case with bars that do not make a distinction between in-house and outside counsel.¹⁶⁰ Whether this marked differentiation between how in-house and outside counsel are regulated is the ideal model in practice is another question.,¹⁶¹

While our Codes of Professional Conduct abound with examples of the “Three-party” model of professional independence,¹⁶² the “Two-party” model, the one that refers to a certain restraint *from* the client, is not as explicitly outlined (to use the categorization models of Myers).¹⁶³ The “Two-party” model of professional independence needs to be inferred by the overall content and general intent of Codes of Professional Conduct, and the presence of duties that may compete with the several professional duties that flow from the core obligation to preserve the client’s interest. Indeed, the lawyer owes a duty to the state, to the courts, to the client, to the profession, to her colleagues and to herself.¹⁶⁴ To fulfill those parallel and contemporaneous duties, the lawyer inevitably has

¹⁶⁰ For a comparative analysis between French legal ethics and American and English legal ethics, see, J. Leubsdorf, *Man in His Original Dignity, Legal ethics in France* (Dartmouth, Ashgate, 2001) at pp.13-28, in particular, on the requirement of independence from the client.

¹⁶¹ As I discuss throughout Part II of this paper, while issues of independence *from* the client may arise more frequently for in-house counsel, they are not unique to them and may be present with outside counsel as well. This raises some doubt as to whether impeaching in-house counsel from being members of their bar is justified and adequately addresses the issue of professional independence *from* the client.

¹⁶² References to independence point towards the duty to be free from any interference to unequivocally serve the interests of the client such as the absence of any conflicts of interest with another client, between the lawyer and the client, or any other outside factor that may impair the lawyer judgment in providing legal services to the client. See for example the rules dealing with conflict of interests: CBA Code, *supra* note 7, at Chapter V and VI; LSUC Rules, *supra* note 7, at 2.04 to 2.06; L.S.B.C. Code, *supra* note 20, at Chapter 6 and 7; L.S.A. Code, *supra* note 7, at Chapter 6, commentary G.3 which are mainly geared towards preserving the client interest; performing non legal functions: L. S.U. C. Rules, *supra* note 8, at 6.04; The CBA Code, *supra* note 7, at Chapter VII; L.S.A. Code, *supra* note 7, at Chapter 15.

¹⁶³ Myers, *supra* note 52, at 861; the L.S.B.C. Code *Supra* note 21, is more explicit on the parallel and contemporaneous interests that the lawyer needs to serve in addition to the client interests: see Chapter 1 “Canons of Legal Ethics”; the Québec Code of Ethics, *supra* note 7, 3.06.05: “An advocate shall safeguard his professional independence regardless of the circumstances in which he engages in his professional activities. In particular, he must not let his professional judgment be subject to pressure exerted on him by anyone whomsoever.”; Rule 3.00.01 states that “An advocate owes the client a duty of skill as well as obligations of loyalty, integrity, independence, impartiality, diligence and prudence”.

¹⁶⁴ Smith, *supra* note 3, at 16 and fol.; the L.S.B.C. Code, *Supra*, note 20, at Chapter 1 “Canons of Legal Ethics”; see also the L.S.A. Code, *supra* note 7, at Chapter 1, Rule 1., which states that the lawyer must uphold the law in delivering advice to the client; see the CBA Code, *supra* note 7, preamble: “The essence of professional responsibility is that the lawyer must act at all times *uberrimae fidei*, with utmost good faith to the court, to the client, to other lawyers, and to members of the public.”, as well as at Chapter XIII The Lawyer and the Administration of Justice, Chapter XV Responsibility to the Profession Generally, Chapter XVI Responsibility to lawyers and others, and Chapter XX No Discrimination, which all enumerate duties of professional and ethical conduct that exemplify parallel and potentially conflicting duties with the lawyer duties geared towards serving and preserving the client interests.

to maintain a certain degree of independence *from* the client and her cause.¹⁶⁵ A proper application of these rules, it seems, would be facilitated by an order of priority or hierarchy between parallel and simultaneous duties in case they conflict with one and the other. Some commentators argue that the first duty of the lawyer is to the state or more generally, the public interest.¹⁶⁶ If there is such a paramount duty that sits higher in the hierarchy of the professional duties of lawyers, one that encapsulates the duty of professional independence *from* the client, our Codes of Professional Conduct do not reflect it. By contrast, the emphasis that our Codes of Professional Conduct put on the “Three-party” model of professional independence, places in-house counsel in a privileged position. If the core duty that our self-regulated profession values above all is the duty of loyalty to the client, then in-house counsel are better situated to fulfill this duty, given the unparalleled knowledge of the business that their position affords and because of their entire and undivided devotion to a single client.

One explanation for the lack of clarity around the nature and scope of the duty of independence *from* the client is that it is more controversial,¹⁶⁷ and that it is more likely to come in conflict with other professional duties that are considered paramount. For instance, the professional duty of confidentiality with respect to the client and the very limited instances where it can be waived by the lawyer (even when the client has or is about to commit criminal or unlawful activities), reinforce the duty of loyalty to the client. It is part of the fundamental right of adequate legal representation. It reflects a strong belief of our legal system that the client can only be well served with an unfettered duty of confidentiality in her favor, and an almost absolute solicitor-client privilege.¹⁶⁸

¹⁶⁵ See Fox, *supra* note 129, at 553, where the author describes the duty of independence from the client as one of the core values of the legal profession.

¹⁶⁶ Smith, *supra* note 3, at 16 and fol. For instance, she should never assist a client in committing an illegal or a criminal act: LSBC Rules, *supra*, note 21, at Chapter 1, Canons of legal ethics, paragraph 1.(1); CBA Code, *supra* note 7, at Chapter III “Advising Clients”, commentary 7; L.S.A. Code, *supra* note 7, at Chapter 14, Rule 2.

¹⁶⁷ Gordon, *supra* note 42, at 11-12.

¹⁶⁸ *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, at paragraphs 14, 16-18. For a criticism of the confidentiality privilege applying to large organization clients, see D. Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988), Chapter 10, “Corporate Counsel and Confidentiality”, 206.

Recent attempts to add new exceptions to the CBA Code,¹⁶⁹ i.e. “whistle blowing” provisions similar to the ones adopted in 2003 by the American Bar Association (the “ABA Model Rules”)¹⁷⁰ have stirred a heated debate.¹⁷¹ As a result, the CBA Code remained substantially unchanged.¹⁷² The ABA Model Rules modifications, which raised a no less heated debate, now allow counsel to divulge confidential information of their client to prevent a crime or fraud or substantial injury to financial interests of another person.¹⁷³ While there is some variance on the scope of the duty of confidentiality, there is no similar exception to the duty of confidentiality in Canada.¹⁷⁴ In case of fraud, crime or other illegal acts, the lawyer’s power of action is limited to going “up the ladder” in the corporate organization,¹⁷⁵ withdraw from the case and eventually to resign.¹⁷⁶ The result is that counsel may interpret the scope of their duty of loyalty to the client as overly broad and feel constrained and ill equipped to face situations where other paramount interests are equally at stake. The arguments put forward against whistle-blowing provisions are that they threaten the privileged relation of confidence and candor that in-house counsel are able to develop by reason of their unique position, by creating a perception that they are a “cop” and not an advisor.¹⁷⁷ It also diminishes in-house counsel’s ability to exercise persuasive influence. Other commentators argue that on the contrary, whistle-blowing provisions give in-house counsel more clarity on their legal and ethical duties and that they can be used as a lever when it comes to ensuring

¹⁶⁹ Supra note 8.

¹⁷⁰ American Bar Association Model Rules of Professional Conduct, (“ABA Model Rules”) available online at the American Bar Association website at www.abanet.org (last visited on February 6, 2011).

¹⁷¹ Paton, supra note 13, at 557-558.

¹⁷² CBA Code, supra note 7, at Chapter IV, “Confidentiality” and Commentary 18.

¹⁷³ ABA Model Rules, supra note 170, Model Rule 1.6.

¹⁷⁴ Supra note 105.

¹⁷⁵ To reconcile the duty of confidentiality with the obligation not to encourage the perpetration of a fraudulent act, crime or unlawful activity, some rules of conduct contain an “up the ladder reporting obligation”: L.S.U.C. Rules, supra note 7, at 2.02 (5) to (5.2); Québec Code of Ethics, supra note 7, 3.05.18.

¹⁷⁶ L.S.A. Code, supra note 7, at Chapter 14; L.S.B.C. Rules, supra note 20, at Chapter 10.

¹⁷⁷ Veasey and Di Guglielmo, supra note 33, at 24: discuss this phenomenon and how this makes law makers careful in making any policy changes that may have a negative impact on the relationship of trust between the corporate counsel and the representatives of the client-corporations.

compliance with the law.¹⁷⁸ It also gives them more courage and power to act independently.¹⁷⁹ The use of this procedure is likely to remain highly exceptional and any abusive recourse to this procedure seem improbable: the inherent pressures and complexities of counsel functions point towards more restraint than overuse. The fear of “breaking communication channels” line of argument is harder to justify to the public when what we are trying to prevent is the commission of a criminal act or securities fraud. In essence, the whistle-blowing provisions¹⁸⁰ come as an aid, as an “exist strategy” to counsel, and to the corporation and the public best interest, when counsel’s persuasive advice to comply with the law has failed. This resistance to any regulation that encroaches on the *sacrosanct* relationship between counsel and corporate clients, even to prevent the commission of criminal acts and fraud, may be another illustration of the failure by the legal profession to recognize the desirability and benefits¹⁸¹ of a greater distance and independence of counsel *from* the client.

Codes of Professional Conduct allow much flexibility on the various approaches to lawyering. There is also a rich debate in the scholarly literature on the ideal role of counsel.¹⁸² In this context, counsel (both in-house and outside counsel) can be torn between very different models. They are given little guidance on how to interpret conflicts between professional duties as they arise. In some areas of practice, the checks and balances assuring a proper order of precedence between the various professional duties may not be as prevalent, making the application of the rules in Codes of Professional Conduct more ambiguous and problematic.¹⁸³ Among the various ideal

¹⁷⁸ Paton, *supra* note 13, at 558; Duggin, *supra* note 5, at 1004: the author points to evidence indicating that business managers realize the importance and are more inclined to seek out “candid legal advice” in the aftermath of the Sarbanes-Oxley new regulation environment.

¹⁷⁹ Paton, *supra* note 13, at 558; Veasey and Di Guglielmo, *supra* note 33, at 21.

¹⁸⁰ Including the mere prospect of using the whistle-blowing mechanism.

¹⁸¹ I.e. to legal counsel, the legal profession and the public.

¹⁸² *Supra* note 61.

¹⁸³ For instance, a transactional lawyer does not interact with the courts and the judiciary, one instance where the interests of clients are more directly confronted to other interests such as preserving the proper administration of justice, deference to the courts, interaction with the other party.

models of lawyering that are proposed, one is of particular interest to our discussion on the need to better articulate the duty of professional *from* the client. Some commentators argue that the role of counsel includes the one of “gatekeeper”,¹⁸⁴ particularly so in the context of public corporations. Although this position is controversial in the legal community, it reflects an interesting attempt to articulate a broader array of interests and duties than the duty of ensuring the most successful outcome to the client alone. It signals that legal professionalism should also entail maintaining a proper distance *from* the client.

Any attempt to establish a hierarchy amongst counsel’s professional duties is eminently complex because of the inherent conflicts within their various roles. For instance on the one hand, in the role of preserving the rule of law, of preserving the independence of their profession and of preserving their clients’ interests,¹⁸⁵ lawyers have a duty to remain critical of the state and unencumbered by it in the fulfillment of their professional duties.¹⁸⁶ On the other hand, these fundamental goals and duties need to be accomplished in support of and compliance with our democratic institutions. While a lawyer may criticize a law and actively take part in any legislative process to improve it, she should not disobey the law, nor encourage any one to do so.

Establishing a hierarchy between the various professional duties of counsel may be impractical or extremely difficult to achieve. However, a poor articulation by the legal profession of the duty of professional independence *from* the client, and of the ideal model of lawyering, as well as the lack of concrete mechanisms to give effect to such duty, provide little support to in-house counsel (and to a certain extent outside counsel). They may face ethical dilemmas in an environment where the strong promotion of

¹⁸⁴ Kim, *supra* note 11.

¹⁸⁵ See for example the CBA Code, *supra* note 7, Chapter IX The Lawyer as Advocate “When acting as an advocate, the lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.”

¹⁸⁶ As Harry Arthurs explains, paradoxically, as much as the legal profession proclaims its independence from the state and is by essence in opposition with the state, in many ways, it is also “deeply implicated in the state”: H. Arthurs, “Lawyering In Canada In The 21st Century” (1996) 15 Windsor Y.B. Access to Just. 202, at 204-207.

undivided loyalty to the client,¹⁸⁷ amplified by the overall structure of in-house legal departments and law firm practices, leave broader duties to the public and to the legal profession vague, remote or even unknown. The Enron, Tyco and Worldcom scandals show all too well where a lack of distance *from* the client can lead to, and how the public can be let down not only by senior executives, but also by lawyers.

Articulated rules of conduct – in this instance on the duty of professional independence *from* the client- can never completely prevent the commission of a crime or always nurture rightful and well guided actions by counsel. But they could give concrete ammunition to counsel, particularly to in-house counsel, in reminding their client-corporation through its representatives, why they hired a professional lawyer in the first place. Hugh P. Gunz and Sally P. Gunz point to what should set professionals in general apart from other employees: “if professionals are not able to retain sufficient independence so as to defend their professional integrity in critical decisions, why, ultimately, pay a premium for their skills? What distinguishes them from any other manager?”¹⁸⁸ A stronger duty of professional independence *from* the client could also protect the client who may be misguided at times about the proper course of action to take. From that perspective, it supports the primary duty of counsel to provide legal services in a competent and diligent manner. Some form of duty of professional independence *from* the client does and needs to exist in order to reconcile the various professional duties of counsel. The void that currently prevails as to its exact nature, and with respect to concrete mechanisms to support its application, needs to be filled. While it may not eliminate the ethical dilemmas that are inherent to the practice of law -whether by in-house or by outside counsel- it may alleviate them significantly.

It is puzzling how bars are unequivocal about the importance of preserving their independence from the state, but only timidly articulate, at the individual member level, the duty of professional independence *from* the client. Clearly, the independence of the legal profession from the state serves a critical function in support of our democratic

¹⁸⁷ As they are reinforced by unfettered duties of confidentiality.

¹⁸⁸ Gunz and Gunz, *supra* note 13, at 249-250, citing M. Davis, “Professional Autonomy: A Framework for Empirical Research” (1996) 6 Bus. Ethics Q. 441, at 454-455.

institutions. But this does not alleviate the responsibility that the legal profession owes towards the public. Resisting state encroachment in how the legal profession regulates counsel on the basis of independence should not be confused with the substantive issues that the state is trying to resolve at any given time, such as the need to protect investors adequately. Protecting the public interest beyond ensuring adequate legal representation of individual clients, should serve as one important justification and legitimacy of their self-regulatory status. As a trade-off of retaining their independence, the bars need to weigh in some of the public interest functions that are normally borne by the state. As Susanna M. Kim points out: “In comparison to all other professions, the legal profession is the most free of external governmental control. Given the enormous amount of independence that is afforded to lawyers in this context, they have a special responsibility to the public and to the system of law to regulate their behavior in the public interest.”¹⁸⁹ In addition to offering support to counsel and to clients, a better articulation of the duty of professional independence *from* the client also serves the public, beyond ensuring the quality of the immediate representation needs of each individual client. Without this recalibration, the legal profession runs the risk of being perceived as compromising its independence for the sake of other powerful interests outside the state, and by the same token, of promoting the self-interest of its members too strongly.

By way of preliminary conclusion, given the little emphasis that the legal profession currently places on the duty of professional independence *from* the client, there is no justification to regulate in-house counsel differently than outside counsel. The equal treatment in the regulation of in-house and outside counsel by the legal profession is consistent with the predominant value that it accords to the fundamental right to adequate legal representation and the duty of loyalty to the client. It is also consistent with an anemic articulation by the legal profession of the duty of professional independence *from* the client. And yet, such duty exists. Without it, counsel’s duties to the court, the legal profession, the state and the public cannot be fulfilled. Professional

¹⁸⁹ Kim, *supra* note 5, at 255.

independence *from* the client can also enable counsel to better fulfill their duty to serve their client in a competent and diligent manner and preserve their client's best interests.

IV. Alleviating ethical dilemmas of (in-house) counsel

The discussion in Part II of this paper points to potential areas of concern for in-house counsel, and in some cases outside counsel, on the ideal degree of independence that they need to maintain *from* the client, i.e. one that can allow them to reconcile their diverging professional duties. Commentators are raising doubt about the real existence on the terrain, of professional autonomy *from* the client for in-house and outside counsel.¹⁹⁰ The analysis in Part II of this paper also reveals that in-house counsel are in a privileged position to promote important core values of the legal profession and that as such, their role in the legal profession should be recognized and encouraged. The lack of articulation of a duty of professional independence *from* the client by the legal profession, and of appropriate mechanisms to actualize it, provide little support and guidance to in-house counsel and to some extent outside counsel.¹⁹¹ It leaves them and their client in a vulnerable position.¹⁹²

The following remarks and recommendations involve a mix of substantive issues and implementation considerations. They give prominence to Codes of Professional Conduct as one important tool to encapsulate substantive goals and rules that are further strengthened by concrete implementation mechanisms. Although there is doubt about the relevance and effectiveness of Codes of Professional Conduct in regulating professional conduct or in resolving ethical issues,¹⁹³ their binding nature on members of the legal

¹⁹⁰ Nelson and Nielson question claims to the existence of professional autonomy *from* the client by in-house and outside counsel representing corporate clients, based on a review of legal ethics literature covering the 20th century which points towards a close alignment with client interests: Nelson and Nielson, *supra* note 6 at 486-487.

¹⁹¹ As discussed in Part III of this paper.

¹⁹² Kim, *supra* note 5, at 257.

¹⁹³ M. A. Wilkinson, C. Walker & P. Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill L.J. 645 at 653, 655, 678: in a study involving the interview of 180 lawyers in Ontario (of which 30 were in-house counsel, in various Ontario centers and various size of law firms) one purpose of the interviews was to determine the extent to which lawyers referred to the code of conduct in their legal practice. Only 16% of the respondents mentioned the code of conduct in their interviews. See also Nelson and Nielson, *supra* note 6 at 490, where the author explains that

profession, makes them an ideal vehicle to incentivize respect for counsel's professional duties. In that spirit, Codes of Professional Conduct should articulate as clearly as is practicably possible, the goals of the legal profession, and how counsel are expected to individually fulfill these goals. In addition, rules to ensure that the structural environment in which counsel evolve is aligned with their professional duties need to be in place.

The "ideal" approach to lawyering is an essential issue for the understanding of the position of in-house counsel in the legal profession. Yet, there is clearly a lack of consensus on what that ideal should be.¹⁹⁴ Greater clarity and articulation around that ideal is a pre-condition to any meaningful regulatory review of in-house counsel and other groups within the legal profession.¹⁹⁵ This exercise is also only possible with a greater introspection into the ideal of the legal profession as a whole and into the meaning of its independence. The two are ineluctably intertwined.¹⁹⁶

Codes of Professional Conduct generally remind counsel that the client is the corporation and not its representatives. Raising the potential conflicts of interests that it may pose and providing for a conflict of interest procedure to follow (inspired by client-to-client conflict of interest rules) could provide additional guidance and support to counsel. However, the difficulty will often reside in identifying the conflict of interest in the first place. Acting in the best interest of the client's corporation may in some cases be open to very diverging opinions. Counsel's trust in or allegiance to the representative of the corporation may be so high that counsel will rely on the representative's view of the

the way in-house counsel construct their role is shaped in large part by how business clients and senior executives react to the way they provide legal advice. In that sense, it is very much a reciprocal process among counsel, their "clients" and senior management.

¹⁹⁴ Wilkinson, Mercer & Strong, *supra* note 61, at 375-382, reviewed the legal ethics literature on the role of lawyers and placed it in two categories: authors promoting the counselor role and the ones promoting the "hired gun" role. The authors argued how the literature presented each role as mutually exclusive. This seemed to contradict both Ontario law and the L.S.U.C. rules of conduct whereby the role of the lawyer is closer to a continuum of the counselor and hired gun roles rather than one to the exclusion of the other (at 388 and 390). This continuum of roles was confirmed by the empirical study that they conducted based on interviews with Ontario lawyers (at 409).

¹⁹⁵ In the Canadian context, Paton, *supra* note 13, at 561, after pointing to the complexity and various ethical dilemma that in-house counsel face in their everyday work, maintains that a review of the Rules of Professional Conduct to address the unique challenges that in-house counsel face should be a first order priority.

¹⁹⁶ For a review of different meanings of independence of the legal profession and its constituency, and how it affects how we view lawyers' roles, see Gordon, *supra* note 42, at pp. 6-30.

interest of the corporation or would not even detect the existence of a conflict of interest. Articulating the likelihood of such conflicts in Codes of Professional Conduct or related instruments can alert counsel and increase their awareness to such ethical issues. Some of the structural recommendations made further below can also offer significant support to counsel who are confronted to a potential conflict of interest.

Even if the concept of the duty of professional independence *from* the client is controversial, such a duty nevertheless exists. The legal profession needs to engage in a dialogue on its scope. When doing so, it should be mindful of the perils of too weak a duty of professional independence *from* the client. Ultimately, such soul searching should be aimed at providing stronger support to counsel, with tangible implementation mechanisms to facilitate its actualization. A better articulation of the duty of professional independence *from* the client raises fundamental issues that relate to the core values of the legal profession. It will need to address the potential conflicts with more established and recognized professional duties. For instance, the duty of professional independence is potentially in conflict with the fundamental right of adequate legal representation, the general duty of loyalty of counsel and the near-absolute nature of the solicitor-client privilege.¹⁹⁷ For that reason, “whistle blowing” or similar provisions are viewed as a threat to these sacrosanct rights and duties and often encounter fierce resistance in the legal profession. At the same time, such provisions are concrete tools for counsel to take a distance from the client to serve other paramount public interests. There is doubt about their efficacy, in part because there may be a natural inhibition to have recourse to such mechanisms. This can be explained by the fear of negative retaliation or by the fear of taking responsibility for the drastic consequences that whistle-blowing mechanisms can lead to. At the same time, their mere existence and the conduct that they seek to clarify and promote can, in and of themselves provide important support to counsel facing seemingly conflicting ethical obligations.

A clearer articulation of the duty of professional independence *from* the client should not necessarily lead to a radically different treatment of in-house counsel, as it is presently

¹⁹⁷ *Pritchard v. Ontario (Human Rights Commission)*, supra note 168.

the case in some European countries judging the practice of law to be incompatible with being a salaried employee of the client. The authority that emanates from a membership to an independent bar would be lost, and with it the ability to effectively provide legal representation with an important preventive and compliance component. The clearer articulation of the duty of professional independence *from* the client should aim at invigorating the position of in-house counsel (and other counsel) rather than weaken it. In-house counsel have the privileged ability to promote several core values of the legal profession. This ability needs to be better recognized and supported. The complexity and role fluidity that may initially draw lawyers to practice law in-house may become less appealing to them after a closer look,¹⁹⁸ even more so in light of recent corporate scandals involving in-house counsel.¹⁹⁹ Safeguards that are specific to in-house counsel, such as special agreements on conditions of employment imposed by some bars, should be considered if they help achieve this goal.²⁰⁰

Based on the reflection and articulation of the duty of professional independence *from* the client, Codes of Professional Conduct ought to generally better articulate the ideal role of counsel. For instance, this could be achieved by offering a clearer delineation of the duties owed to the administration of justice, the legal profession and the public, beyond the duty of loyalty and confidentiality²⁰¹ owed to the client (including through its representatives). In that vein, the zones of tension where this ideal role can be compromised (for example, through conflicting ideals with client expectations, or when counsel cumulate various legal and non legal functions) need to be better identified. In-

¹⁹⁸ De Mott, *supra* note 5, at 981.

¹⁹⁹ J. Schachner Chanen, "Cautiously Corporate — In the Sarbanes-Oxley Era, Lawyers Still Go In-House But Enter Carefully", *ABA Journal* (November 2004) available online at the American Bar Association website: http://www.abajournal.com/magazine/cautiously_corporate/.

²⁰⁰ For example, in the Netherlands, in-house counsel enter into a special agreement with their employer that is regulated by the Bar. Such special agreement includes provisions that protect in-house against disciplinary measures (including termination of employment) by her client-employer in case of differences of opinion on the nature and substance of legal advice. There is also a dispute resolution mechanism set up by the Bar Association. For a description and discussion of the Dutch special agreement, see the Opinion of Advocate General Kokott, *supra* note 14.

²⁰¹ For instance, the duty of confidentiality and of discretion owed to the client may at time be over generously interpreted by counsel and as having a paralyzing effect on the path that she should take in compliance with other professional duties such as the duty not to encourage the commission of any illegal act or actions to be taken when a lawyer becomes aware that an illegal act is about to be committed.

house and outside counsel need to be provided with the necessary tools to realize this ideal.²⁰² A duty reminding counsel that reporting structures,²⁰³ performance evaluation and monetary incentives²⁰⁴ (whether for in-house or outside counsel) should be aligned with those ideals and the corresponding duties, can play a significant role in ensuring better compliance with counsel's professional duties.²⁰⁵ Targeting specific methods of remuneration that can have a detrimental effect on compliance with professional duties should be considered. Codes of Professional Conduct could generally raise concern for any mode of remuneration that may come in conflict with serving the best interests of the client while retaining independent professional judgment. Specific proposals have been put forward to redress such misalignments. One of them is that board of directors of publicly traded companies should be directly involved in the selection and evaluation of general counsel.²⁰⁶ Another suggestion is that performance objectives should incite ethical behavior and the exercise of independent professional judgment, and that in-house counsel should be rewarded for this.²⁰⁷ In that vein, the practice of stock options and departmental bonuses has been raised as posing potential ethical issues around the duty of professional independence.²⁰⁸ Generally, rules requiring that the performance evaluation

²⁰² As Duggin points out: "Lawyers need to be proactive ethical actors capable of looking beyond the cribbed confines of technical legal questions and willing to respond assertively to safeguard the integrity of their client entities when they encounter evidence of wrongdoing. This is particularly true for general counsel, for they are invariably on the front lines in the corporate legal arena": Duggin, *supra* note 5, at 1020 -1021.

²⁰³ See for example Kim, *supra* note 11, at 1054; the author suggests that for public companies, general counsel should report directly to independent members of the board of directors.

²⁰⁴ Veasey and Di Guglielmo, *supra* note 33, at 13, suggest, with respect to in-house counsel that "the corporation should design a compensation plan for in-house counsel that rewards exceptional and professionally independent legal work, as distinct from pure financial performance."

²⁰⁵ Veasey and Di Guglielmo, *supra* note 33, at 24: suggest that "Structures in which lawyers regularly report directly to the board or a key corporate official allow lawyers to bypass managers without creating the risk of retaliation that might result from sporadic reporting up."

²⁰⁶ See recommendation by the American Bar Association's Task Force on Corporate Responsibility, who proposed in 2003 that the board of directors of public corporations approve general counsel's "selection, retention, and compensation: Am. Bar Ass'n House of Delegates, Report No. 119C (2003), reproduced in Am. Bar Ass'n, Report of the Bar Association Task Force on Corporate Responsibility (2003) 59 Bus. Law. 145; see however the comments of DeMott, *supra* note 5, at 980, where the author notes that "Strengthening the board's relationship with general counsel may weaken the bonds between the CEO and general counsel, as would instituting a practice of regular meetings between general counsel and a committee or other group of independent directors".

²⁰⁷ Veasey and Di Guglielmo, *supra* note 33, at 13.

²⁰⁸ See Z. J. Barclift, "Corporate Responsibility: Ensuring Independent Judgment of the general counsel--a Look at Stock Options" (2005) 81 NDLR 1; see also Kim, *supra*, note 11, at 1053 and fol., who recommends that

and remuneration methods of counsel (both in-house and outside) need to be aligned with their professional conduct obligations, would be a first step to address the potential impact of remuneration on ethical behaviors. Their proper implementation by law firms and in-house legal departments would provide greater support to in-house and outside counsel, alleviating the likely occurrences of ethical dilemmas caused by compensation and performance incentives.²⁰⁹

There should be a specific requirement in Canadian professional bars to pursue continuing education in legal ethics.²¹⁰ Imposing it as a requirement (and monitoring the same through annual filings and disclosures) could be an important way to keep counsel (and in particular in-house counsel) appraised of legal ethics issues and recent developments. Continuing education on legal ethics as a requirement to maintain membership to the bar would exemplify an even stronger commitment to compliance by the legal profession. It would stimulate an ongoing conversation between members of the legal profession and the public that may lead to a more refined understanding of the ethical issues confronting counsel. In turn this could lead to more adapted responses and solutions by the legal profession. The various professional associations also need to give more visibility and provide better support to their members in the area of legal ethics.²¹¹ The need to appoint ethics officers in larger in-house legal department and law firms, with reporting duties on their activities would be another way to promote a greater awareness of legal ethics and raise its profile.

compensation through equity should be limited in a way that avoids conflicts of interests.

²⁰⁹ As Duggin points out on the pressures of in-house counsel: “They are urged to be team players in a game where winning depends on wealth maximization—corporate and individual. Measures designed to require ethical vigilance on the part of general counsel need to support broader values and empower general counsel to act as “lawyer statesmen” who offer insights that go beyond technical legal advice”: Duggin, *supra* note 5, at 992.

²¹⁰ The Law Society of Upper Canada introduced a compulsory continuing professional development requirement starting as of January 1 2011. Under this requirement, lawyers and paralegals must complete at least 12 hours of continuing professional development per year, of which at least 3 of the 12 hours must be “on topics related to professional responsibility, ethics and practice management”. See “Continuing Professional Development” on the Law Society of Upper Canada website at <http://rc.lsuc.on.ca/jsp/cpd/index.jsp> (last visited on February 6, 2011). See J. Downie & R. Devlin “Fitness for Purpose: Mandatory Continuing Legal Ethics Education for Lawyers” (2009) 87 Can. Bar Rev. where the authors argue in favor of compulsory legal ethics education both from the perspective of lawyers’ ability to practice law and of law societies in serving the public interest.

²¹¹ through anonymous blogs on ethical issues or otherwise: Kim, *supra* note 11, at 1074.

V. Conclusion

The analysis of in-house counsel within the legal profession shows the complexity of the task that any regulation on the *role of counsel* entails. It is incumbent upon the justifications that withstand the independence of the legal profession and the role that it is called to play, for which, beyond certain fundamental principles, there is no clear consensus. At a more immediate and concrete level, it shows the difficult balancing act with which counsel, the legal profession and the bars are confronted with. Providing more guidance and tools at the regulatory level to alleviate the undue burden of conflicting allegiances is essential if the legal profession is to support and even promote the practice of law by in-house counsel. To this end, a better understanding of how clients generally seek out counsel for legal advice and apply it, as well as of the scope and limits of counsel's actual influence on their client, is also critical.²¹² In the end, the recommendations for reform made in this paper would not only benefit in-house counsel, but also outside counsel, their clients, the legal profession and the public.²¹³

Urging the legal profession self-regulating bodies to better articulate the meaning and foundation of their independence, and to also provide more clarity on the degree of independence *from* the client may lead to further research and debate on other areas of counsel's role that have not been explored in this paper. For instance, how the duty of professional independence *from* the client should be articulated when counsel contribute to scientific publications and participate in professional education panels and debates? The discussion of this paper may also be of relevance to other debates within the legal profession, such as the issues that revolve around multidisciplinary practice. Proposals

²¹² On the review and analysis of qualitative and quantitative data on the influence that professional advice has on compliance, see: C.E. Parker, R.E. Rosen & V. Lehmann Nielsen, "The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation" (2009) 22 Geo. J. Legal Ethics 201.

²¹³ Paton, *supra* note 13, at 562, points out on the benefits for the legal profession to recognize the unique challenges that in-house counsel may face: "In the end, lawyers, corporations and the public will all be better served by corporate counsel who have the broader bar's understanding of — and empathy for — the social and professional reality they occupy within the often-crossed fiduciary and professional responsibilities to their clients and the responsibilities they have to the public as gatekeepers in the post-Enron".

for further developments and transformation of the legal profession in that direction are likely to resurface in one form or the other in a not so distant future.